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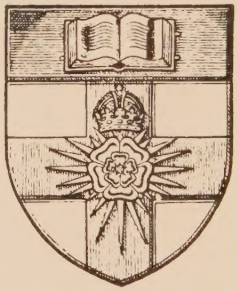

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1896.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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ADDENDA.

In re EARL OF STAMFORD, PAYNE *v.* STAMFORD, p. 288.

To the list of solicitors given on p. 301 of the report of this case, add Mr. *Arthur E. Griffiths*, the solicitor of Sir Thomas Wright.

In re HARDY, HARDY *v.* FARMER, p. 904.

It should be noted that s. 18 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) was repealed by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71) and is now replaced by s. 3 of the latter Act.

ERRATA.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BELL. JEFFERY *v.* SAYLES.

C. A. 1895 *Nov.* 4, 6

[1895 B. 953.]

Mortgagee—Mortgage of Trust Fund—Receipt of whole Fund by Mortgagee.

W., being entitled in reversion to one-eighth of a sum of 8000*l.* bequeathed to trustees, assigned it by way of mortgage to G., with power to give receipts in the name of W. or otherwise, with a proviso for redemption. On the death of the tenant for life of the fund, J., to whom the mortgage had been transferred, claimed to receive from the trustees 1000*l.*, the whole amount of the share, the sum due on the mortgage being only about 400*l.* The trustees of the will, who had received notice of subsequent incumbrances, expressed themselves willing to pay to J. what was due on his mortgage, but declined to pay over to him the whole share. J. took out an originating summons to compel payment:—

Held (reversing the decision of Kekewich J.), that the trustees were not bound to pay over the whole share to J., and that the summons must be dismissed.

WILLIAM BELL, by a will dated June 8, 1866, bequeathed to his trustees a legacy of 8000*l.* upon trust for his daughter, Eliza Morton, for life, and after her death for her children, and in default of children of hers then as to one moiety thereof in trust for the four children of the testator's sister, Janet Wells, in equal shares. The testator died in August, 1866.

In 1879 Eliza Morton was living, but had no child, and was past the age of child-bearing.

C. A. 1895 *In re* BELL. JEFFERY *v.* SAYLES.

By indenture dated May 31, 1879, made between Dudley Wells (one of the four children of Janet Wells) of the one part, and George Garland of the other part, D. Wells, in consideration of 380*l.* paid to him by Garland, assigned to Garland, his executors, administrators, and assigns, all that the one undivided fourth part or share to which the said D. Wells was entitled as one of the four children of the said Janet Wells, of and in the moiety of the said sum of 8000*l.*, and every other part or share (if any) of the said D. Wells of and in the said sum so bequeathed by the said recited will of the said William Bell, and of and in the stocks, funds, and securities in or upon which the same were or thereafter from time to time might be invested, and the dividends, interest, and annual produce thereof, and all the right, title, interest, claim and demand of the said D. Wells to, in and upon the same. Together with full power for the said G. Garland, his executors, administrators, and assigns, to ask, demand, sue for, recover, and receive and give valid receipts for all or any part of the said premises thereby assigned or expressed so to be in the name or names of the said D. Wells, his heirs, executors, or administrators, or otherwise. To hold the said part share and premises thereby assigned or expressed so to be (subject to the said prior estate of the said E. Morton therein) unto the said G. Garland, his executors, administrators, and assigns, subject to a proviso for redemption on payment by D. Wells, his heirs, &c., to Garland, his executors, administrators, or assigns, of 380*l.* with interest as therein mentioned.

This security became vested by transfer in William Jeffery.

On July 15, 1882, Dudley Wells, by a deed of arrangement under the Bankruptcy Act, 1869, assigned his above-mentioned share, subject to the above mortgage to a trustee for the benefit of his creditors.

In 1894 Mrs. Morton, the tenant for life of the 8000*l.*, died.

Mr. Jeffery insisted that he was entitled to have the whole 1000*l.*, Dudley Wells's share of the 8000*l.*, paid to him. The trustees of the will stated that they had received notice of a mortgage of September 18, 1880, on this share, but that it was understood that it had been satisfied, and notice of the deed

of July 15, 1882, and an order of the court of bankruptcy referring to it. They expressed themselves willing to pay Mr. Jeffery what was due on his mortgage; but not to pay over the whole of D. Wells's share to him.

Mr. Jeffery, who had also a mortgage on the share of another son of Janet Wells, took out an originating summons against the trustees of the will, asking that these two shares might be paid to him, or in the alternative for an order that the trusts of the will as to these two shares might be administered by the Court.

Kekewich J., as regarded the share of Dudley Wells, to which alone the present report relates, made an order for the trustees of the will to pay it to Mr. Jeffery, and being of opinion that they had been wrong in declining to make such payment, he ordered them to pay half the costs of the action as being the costs of the proceedings relating to this share. The trustees appealed.

Warrington, Q.C., and *Johnston Edwards*, for the appellants. This summons ought to have been dismissed with costs, so far as it relates to the share of Dudley Wells. In respect of that share the plaintiff is entitled to be paid the principal money and interest due upon his mortgage, and nothing more. The trustees have received notice of a subsequent assignment, and they cannot disregard this notice and hand over the whole fund to the plaintiff, nor does it lie in his mouth, as a prior assignee, to say so. As to the difference between conditional tender and tender under protest, they referred to *Greenwood* v. *Sutcliffe*. (1)

Marten, Q.C., and *W. G. Lemon*, for the respondent Jeffery.

[RIGBY L.J. Have you any authority shewing that the mortgagee is entitled to claim payment of the whole sum mortgaged?]

In re Foligno's Mortgage (2) is precisely in point. An analogy may be drawn from the case of a general power exercisable by will if the donee exercises it and appoints executors; they are the persons to receive the fund: *In re Hoskin's Trusts*. (3) An

(1) [1892] 1 Ch. 1. (2) 32 Beav. 131.
(3) 5 Ch. D. 229; 6 Ch. D. 281.

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assignment of debts made as a security, with a proviso for redemption, has been decided to be an absolute assignment within s. 25, sub-s. 6, of the Judicature Act, 1873, so as to enable the assignee to sue in his own name: *Burlinson* v. *Hall* (1); *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (2) The object of the Judicature Acts is to give an extensive power to an assignment, so as to facilitate the recovery of what is assigned. The mortgagee here was made as it were a derivative trustee, and as such entitled to receive the whole fund, and administer what remained after paying off his own security.

[RIGBY L.J. If the 1000*l.* had been in Court, would the Court have ordered it to be paid to Mr. Jeffery?]

No doubt it would not, but that the Court of Chancery would retain a fund does not shew that it is right for trustees to retain it.

Johnston Edwards, in reply.

LORD HALSBURY L.C. Being suddenly called away by public duties I will say no more than that I cannot concur with the decision of Kekewich J. My learned brothers who have come to the same conclusion will state their reasons. [His Lordship then left the Court.]

A. L. SMITH L.J. William Bell died leaving a will under which Dudley Wells became beneficially entitled to one-eighth share of a legacy of 8000*l.* bequeathed to trustees. He assigned that share to Garland by way of security with a proviso for redemption, and that mortgage has been transferred to Mr. Jeffery. A subsequent incumbrance was created by Dudley Wells on this share, and he afterwards became bankrupt, and by a deed of arrangement under the Bankruptcy Act assigned the share to a trustee for the benefit of his creditors, subject to Jeffery's mortgage. Mr. Jeffery is entitled under his security to 380*l.* and interest, and has taken out an originating summons asking that the trustees of the will may be ordered to pay over to him the whole of Dudley Wells's share, amounting to 1000*l.* The puisne incumbrancers were not before the Court, but Mr.

(1) 12 Q. B. D. 347. (2) 23 Q. B. D. 239.

Jeffery, on his own shewing, is not entitled to the 1000*l.*, but only to a sum which I will call 400*l.*, and the question is whether he is entitled to demand to have the whole 1000*l.* paid over to him. It would be absurd for me to say that I am as familiar as my brother Rigby with the practice of the Court of Chancery; but it certainly seems to me odd that because a man is entitled to receive out of a trust fund 400*l.* he is therefore entitled to receive and administer the whole fund. Is this so? Mr. Marten admitted that if the fund was in court, the Court would only pay out to Mr. Jeffery the 400*l.*, and would itself administer the remainder. It is clear that Mr. Jeffery has only a security for 400*l.* on the 1000*l.*, and why should the whole 1000*l.* be paid to him? No reason was given why it should be. Kekewich J. has gone further than ordering this payment; he has held that the trustees were so wrong in refusing to make the payment that they ought to be ordered to pay the costs of the proceeding to compel them to make it. The order must be reversed, and Mr. Jeffery must be ordered to pay the trustees' costs relating to this part of the case.

RIGBY L.J. I am of the same opinion. By the will of William Bell a legacy of 8000*l.* was bequeathed to trustees, so that at law the property was in them. Dudley Wells became beneficially entitled in reversion to one-eighth of this fund, and a brother of his to another one-eighth. Each of these shares was assigned by way of mortgage, and both mortgages became vested in Mr. Jeffery. As regards the first share, Mr. Jeffery seeks to make the trustees of the will liable because they declined to pay the whole 1000*l.* to him after receiving notice that there were subsequent incumbrances, the sum due to him being only about 400*l.* I am of opinion that the trustees were not bound to pay over the whole 1000*l.* to him. I shall not go into all my reasons for this; I rest on the acknowledged practice of the Court of Chancery. If the 1000*l.* was in Court, the Court would not pay it to the mortgagee, and if it would not, why should a trustee be bound to do so? I think that the trustees had a right to have the different claimants before them, and that it was their duty to settle the claims. The order on

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the trustees to pay to Mr. Jeffery the 1000*l.* and his costs of the proceedings relating to it is in my judgment wrong. It would also be wrong to make an administration order, for there is no doubt as to what the rights of the parties are, and there is no occasion for that expensive proceeding. The only proper order is to dismiss the summons with costs, so far as it relates to the share of Dudley Wells.

Solicitors: *E. F. M. Ryan; Hepburn, Son & Cutcliffe.*

H. C. J.

C. A. 1895 VAUGHAN WILLIAMS J. *Nov.* 2. C. A. *Nov.* 22.

In re KINGSTON COTTON MILL COMPANY.

[0098 of 1894.]

Company — Winding-up — Misfeasance of Officers — Auditors — Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

An auditor of a limited company was appointed under articles of association which, so far as they related to the audit of accounts, were in substantially the same terms as the audit clauses of Table A and as the articles of association in *In re London and General Bank* ([1895] 2 Ch. 166), although it was not a joint stock banking company:—

Held, on the authority of that case, that he was an officer of the company within s. 10 of the Companies (Winding-up) Act, 1890.

Per Vaughan Williams J.: In every case where an auditor of a company is appointed under articles of association which impose upon him the duty of examining the balance-sheet and reporting to the members whether, in his opinion, it is a full and fair balance-sheet, containing the particulars required by the articles, and properly drawn up so as to exhibit a true and correct view of the company's affairs, he is an officer of the company within s. 10 of the Companies (Winding-up) Act, 1890.

A SUMMONS having been taken out by the official receiver and liquidator in the winding-up of the above-named company, under s. 10 of the Companies (Winding-up) Act, 1890, against the directors and auditors of the company, the auditors took out a summons asking that all proceedings under the first summons might be stayed as against them on the ground that they were not officers of the company within s. 10.

The company was registered under the Companies Act in 1879.

The articles of association which related to the accounts of the company and to the audit thereof were as follows:—

"123. The directors shall cause true accounts to be kept

"(*a*) Of the sums of money received and expended by the company, and the matters in respect of which such receipt and expenditure take place;

"(*b*) Of the assets, credits, and liabilities of the company;

"(*c*) Of all contracts entered into by or on behalf of the company, and when and for what purpose and with whom.

"124. Such accounts shall be kept in such manner and upon such principle as shall be decided by the auditors.

"125. Once at least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

"126. The statement so made shall have arranged under the most convenient heads the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

"127. A balance-sheet shall be made out in every year and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company.

"128. A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member, in the manner in which notices are hereinafter directed to be served.

"129. Once at least in every year the accounts of the

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company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

"130. The first auditors shall be appointed by the directors. Subsequent auditors shall be appointed by the company in general meeting.

"131. If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

"132. The auditors may, but need not, be members of the company; but no person shall be eligible as an auditor who is interested otherwise than as member in any transaction of the company, and no director or other officer of the company shall be eligible during his continuance in office.

"133. The appointment of auditors shall be made by the company at their ordinary meeting in each year.

"134. The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.

"135. Any auditor shall be re-eligible on his quitting office.

"136. If no auditor shall be appointed at any ordinary meeting, or if any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith appoint an auditor to act until the next ordinary meeting.

"137. If no appointment of auditors is made in manner aforesaid, the Board of Trade may, on the application of not less than five members of the company, appoint an auditor to act until the next ordinary meeting, and fix the remuneration to be paid to him by the company for his services.

"138. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

"139. Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, unless he himself is an accountant, employ accountants or other persons at the expense of the company to assist him in investigating such accounts; and he may, in relation to such accounts, examine the directors or any other officer of the company.

"140. The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these articles, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs; and in case they have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

The only other articles which were material to the present case provided as follows:—

"98. The directors and other officers of the company, and their respective heirs, executors, and administrators, shall be indemnified and saved harmless out of the funds of the company from and against all costs, charges, damages, and expenses which they may respectively incur or sustain in or about the execution of their respective offices, or in or about the making of any contracts or agreements which they shall bonâ fide make on behalf of the company and in furtherance of the objects thereof."

"119. The directors may, with the sanction of the company in general meeting, declare the dividends to be paid to the members, and the directors may at any time direct the payment to the members of such interim dividends, in anticipation of the full dividend, as in their judgment the position of the company justifies."

The summons was heard before Vaughan Williams J. on November 2, 1895.

Swinfen Eady, Q.C., and *Eve, Q.C.*, for the auditors.

Cozens-Hardy, Q.C., and *W. D. Rawlins*, for the official receiver and liquidator.

VAUGHAN WILLIAMS J. This summons raises the question whether the auditors of this particular company are its officers within the meaning of s. 10 of the Act of 1890. That section is

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very like s. 165 of the Act of 1862; but such little differences as there are between the two sections shew that the legislature did not mean to curtail the operation of the 165th section, but to enlarge it. If there had not been any previous decisions on the sections, I should have had little hesitation in holding that these auditors, having regard to the duties which they had to perform, were officers of the company within the meaning of s. 10. There have in fact been various decisions on s. 165 of the Act of 1862; but I see nothing in any of them to prevent my deciding this case as I should have done if there had been no such decisions. Mr. Eady says that I ought not to hold that every person who has been guilty of misfeasance, or a breach of trust in relation to the company, is therefore an officer, and I agree with him. Then he says that I ought not to hold that every person who is in such a position that he can be compelled to repay moneys or to restore property, or every person who is in such a position that he can be compelled to contribute money to the assets of the company by way of compensation in respect of such misapplication, retention, misfeasance, or breach of trust, is an officer. I agree again. I can conceive cases where there might be a wrongful retention of moneys or breach of trust by a person who nevertheless would not come within this section. I can also quite conceive an instance where a person might be in such a position that he could, by the application to the case of the ordinary principles of law, be compelled to contribute moneys to the assets of the company by way of compensation for the breach of his duty towards the company, and yet not be a person whose misdeeds could be dealt with under this section. In addition to such a breach of trust, or such a misfeasance as is defined by the section, it is absolutely necessary, in order to bring the case within the section, that the party guilty of the misconduct should be an officer of the company. I have really only to decide in this case whether these applicants are officers of the company. Mr. Eady apparently does not deny that the duties of these auditors are such that they might be guilty of a breach of trust, or possibly of misfeasance; but he says that, even assuming they were so guilty, they are not within the section

because they are not officers. Mr. Eady instanced the case of an accountant or auditor who is called in to report to a committee of investigation nominated by the shareholders, and he submitted that there was no difference to be suggested between that case and the case of an auditor appointed by the shareholders. It seems to me to be obvious that there is a very great difference; but I have not to decide whether an accountant acting in that way would or would not be an officer. I think it safer not to express any opinion on the point. What is the position of an auditor appointed under these articles? He is not a person who is called in according as he is wanted or not wanted; he is appointed in each year. He is a person without whose appointment it would be impossible under these articles for the business of the company to be carried on in any year; that is to say, so far from being an occasional accidental officer appointed to perform duties which might or might not arise, he has to perform duties without the performance of which the company could not in any year, according to these articles, go on or the directors perform their duties. And, moreover, he not only has to make the audit and report—without which the dividends could not be declared or the financial business of the company be carried on—but he has a duty to perform in conjunction with the directors. No doubt he is acting antagonistically to the directors in the sense that he is appointed by the shareholders to be a check upon them; but at the same time he and the directors together have to do a series of acts without the doing of which a dividend cannot be declared. The directors, either with or without the assistance (in fact, one knows it is always with the assistance) of the officers of the company, prepare a balance-sheet. The auditors check the balance-sheet against the books of the company and then make a report, and they perform the duties which are set forth in arts. 138 and 140. The auditors, having been supplied by the directors and officers with a copy of the balance-sheet, examine it with the accounts and vouchers—a piece of work which is the result of the performance of duties both by the directors and the auditors—and then the auditors are to make a report to the members upon the balance-sheet and accounts which have so

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come into existence and been audited; "and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these articles, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs." I want to say generally of auditors that I have no doubt myself but that auditors who have to perform that duty are not only in this case, but in all cases, officers of the company. I think that, in arriving at such a conclusion, I am arriving at a conclusion which seems to be clearly expressed by the Lord Justice Kay. In *In re London and General Bank* (1) he says: "I have come to the same conclusion," that is, to the conclusion that the auditors in the particular case of the London and General Bank were officers of the company; "but I wish to guard myself against being understood to hold that in every case of a joint stock company the auditor employed by the joint stock company is an officer of the company." I understand the Lord Justice to mean by that that generally he will be, but that he desires to guard himself against being supposed to say that in no case can he be other than an officer of the company. He proceeds to illustrate what he means: "I can quite conceive that there may be cases of a joint stock company who call in an auditor to make a particular audit where the auditor called in could not be properly treated as an officer of the company." I understand the Lord Justice to mean by that that if the auditor has to perform those duties which we know are so generally performed by auditors of companies — duties in which the directors and the auditors have each of them to intervene— and the auditors have to report upon the balance-sheet and accounts presented to them by the officers of the company, in such a case the person performing those general duties would clearly be an officer of the company; but the Lord Justice does not wish to say that in the case of a particular audit—of which, I think, Mr. Eady supplied an admirable example when he suggested an audit required by a committee of investigation nominated by the shareholders—that would necessarily make the

(1) [1895] 2 Ch. 166, 173.

auditor who was called in to perform that duty an officer of the company. The Lord Justice afterwards refers to the provisions of the articles of the London and General Bank, which, it seems to me, imposed upon the auditors of the bank duties almost identical with those imposed by the articles in the present case. I did not understand Mr. Eady—who called my attention strongly to the fact that the Act of 1879 has no application to a case like this, which is the case of an ordinary commercial company—to ask me to come to the conclusion that the Court of Appeal in *In re London and General Bank* (1) meant to say that the auditors were officers of the company there because of the provisions of the Act of 1879 relating to joint stock banking companies; and it seems to me that, whether I were asked to say that or not, the Lords Justices did not mean in any way to say that. I mention the fact as one emphasising the duty that an auditor has to render to a banking company.

I confess I do not quite understand what Mr. Eady suggests as being sufficient to prevent the applicants in the present case from being officers of the company. I have already pointed out that they are not called in to perform an accidental or occasional duty. They are called in to perform the duties of an office which is created by the articles themselves. He says that they are paid by fees. So are the directors. He says that they are not appointed permanently; they are elected from time to time. So are the directors. I think it is much the safest thing in a case of this sort simply to say that, having regard to the articles of this company, I have come to the conclusion that these particular auditors are officers of this company. But, although that may be the safest thing to do, I cannot persuade myself to stop short at that stage. I prefer to say at once that I think these auditors are officers of the company because they have to perform a duty which is prescribed by the articles—a duty which they have to perform in conjunction with the officers of the company—a duty the performance of which, as appears by the articles, will necessarily be the basis of the action of the shareholders in reference to the annual declaration or

(1) [1895] 2 Ch. 166.

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non-declaration of a dividend. I cannot conceive why such persons should not be officers. It is said that I ought not to say that they are officers of the company because it has been held that a company's bankers are not its officers—and of course they are not—or because solicitors are not officers of the company. Of course, as a rule, they are not. They may in particular cases have such duties to perform that they are officers of the company; but primâ facie neither the bankers nor the solicitors have to perform such duties as I find prescribed for the auditors by these articles. In fact, the duties of a banker and the duties of a solicitor are not prescribed by the constitution of the company. Under these circumstances, in my judgment, I am bound to hold that the auditors of this company are officers of the company within the meaning of the section.

F. E.

C. A.

The auditors appealed. The appeal was heard on November 22, 1895.

Swinfen Eady, *Q.C.*, and *Eve*, *Q.C.*, for the auditors. The question in this case is whether an auditor of a joint stock company with limited liability is an officer of the company within the Companies Acts. It is submitted that the relationship between a professional man and a company does not constitute him an officer of the company under s. 10 of the Act of 1890, or under the corresponding section (s. 165) of the Act of 1862. It has been so held in the case of a solicitor, *Carter's Case* (1), and in the case of a banker, *In re Imperial Land Company of Marseilles* (2), and in *In re Liberator Permanent Benefit Building Society*. (3) Cave J. has expressed a similar opinion with regard to a broker and an auditor. An auditor who has been fraudulent or negligent in auditing the accounts of a company cannot properly be described as guilty of a "misfeasance or breach of trust in relation to the company" within the meaning of those sections according to the judicial interpretation which those words have received. For in a case arising under the earlier section it has been laid down that the word "misfeasance"

(1) 31 Ch. D. 496. (2) L. R. 10 Eq. 298.
(3) 71 L. T. (N.S.) 406.

was there confined to a misfeasance in the nature of a breach of trust: *per* James L.J. in *Coventry and Dixon's Case.* (1) The object of the Legislature was to provide a summary remedy against persons who were engaged in carrying on the business of the company, and who had control of the assets—against the executive. But an auditor is not one of the executive; he is not a permanent official; he is appointed for one year only to perform a particular duty, namely, to audit the accounts at the end of the year, and, so far from being an officer of the company, he is appointed by the shareholders to act as a check upon the officers. In one respect s. 10 is more favourable to the appellants than s. 165, since the later section refers to "directors and other officers" instead of "directors and any officers." That points to officers ejusdem generis with directors. *In re London and General Bank* (2) has decided that an auditor of a particular banking company was an officer, but that decision turned upon s. 7 of the Companies Act, 1879, which made it compulsory upon banking companies to appoint an auditor, and upon the articles of that company. But, except in the case of a bank, there is no legal obligation upon a limited company to have an auditor at all; for Table A may be excluded, as it usually is, and the articles may contain no express provision on the subject. Nor is an auditor, in fact, necessary to the existence of a company, although a company could not carry on business without directors or a manager. Here the articles relating to the audit of accounts are substantially in the same terms as the audit clauses in Table A. The articles of the London and General Bank, though similar in many respects, are distinguishable from the articles in the present case in two important particulars, namely, that in the articles of the bank the auditor is described as an officer of the company, and the indemnity clause is made applicable to "auditors and other officers."

[Reference was also made to *Ex parte Valpy and Chaplin* (3); *Wright* v. *Horton* (4); and *In re International Pulp and Paper Co.* (5)]

(1) 14 Ch. D. 660, 670.
(2) [1895] 2 Ch. 166.
(3) L. R. 7 Ch. 289.
(4) 12 App. Cas. 371.
(5) 6 Ch. D. 556, 560.

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Cozens-Hardy, Q.C., and *W. D. Rawlins*, for the liquidator. This case is covered by *In re London and General Bank.* (1) The provisions of the Act of 1879 which relate to the audit of accounts are almost identical with the audit clauses of Table A, and the effect of that Act was to make those clauses compulsory upon banking companies. The bank had in addition articles of association of its own; but those articles merely carried into effect the statutory obligations imposed by the Act of 1879. Nor is there in substance any distinction between those articles and the articles in the present case. [They were stopped.]

Eve, Q.C., in reply.

LORD HERSCHELL. In this case an application is made under the 10th section of the Companies (Winding-up) Act, 1890, to proceed against the directors and the auditors of the company on the ground that they have been guilty respectively of misfeasance within the meaning of that section. We have not here to determine whether they have been guilty of such misfeasance. We have not the facts before us. We have not even to determine whether the allegations of the summons shew a primâ facie case of what would be misfeasance under the statute. All that we have to determine is whether the auditors in the present case are persons in such a position as to come within the meaning of the word "officers" as used in the 10th section, so as to entitle the liquidator to proceed against them. Now, a question very similar to this came before the Court of Appeal in the case of *In re London and General Bank.* (1) The question there was whether the auditors of the London and General Bank were officers within the meaning of the section in question. This Court held that they were, and I can see no substantial distinction between that case and the present. I will allude in a moment to the distinctions which have been suggested; but it seems to me that it would be frittering away that case altogether if we were to rest our determination upon any of the distinctions which alone can be made in the present case. Now, I desire to express no opinion upon

(1) [1895] 2 Ch. 166.

the question whether *In re London and General Bank* (1) was rightly or wrongly decided. It may be that the reasoning in that case is open to criticism. It may be that some considerations which bear upon the question were not referred to, or had not full effect given to them; on all that I express no opinion at all. I desire to retain absolute liberty of action, in case it should hereafter become necessary, with regard to the question whether *In re London and General Bank* (1) was rightly decided. Let us see what *In re London and General Bank* (1) did decide. It decided that the auditors appointed in that case were officers within the meaning of the section. On what grounds? Under the Act of 1879 certain articles contained in Table A, which, prior to that Act, companies might either adopt or reject as they pleased, became by statute absolutely binding on banking companies. That, even if not strictly accurate, is sufficiently accurate for the purpose of this case. Under that Act banking companies were compelled to appoint auditors, and certain provisions were made applicable to them, which were in substance the provisions of Table A so far as auditors are concerned. Now, the London and General Bank, besides these, what I may call compulsory articles, had also articles of its own. The reasoning in that case was rested largely, I may say mainly, on this—that the auditors were, by the provisions of the Act of 1879, which were made applicable to the bank, made officers of the company. The language of those provisions was dwelt upon as shewing that they were officers of the company. It is true, and here comes the distinction suggested, that in the articles in that case they were so denominated in an indemnity clause, whereas in the present case they are not so denominated. But it would be far too narrow a distinction to rest any difference of decision on that ground. If the provisions as to misfeasance of officers extended to the auditors in the case of the London and General Bank, it seems to me that no substantial reason can be given why they should not extend to the auditors in the present case. I cannot in substance distinguish the two cases. The reasoning which led to the conclusion in the one case seems to me necessarily

(1) [1895] 2 Ch. 166.

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to lead to it in the other. But, of course, all that we decide is that, in a case identical with *In re London and General Bank* (1), as I take this to be in substance, the auditor is an officer. We decide that as bound by the previous decision of the Court of Appeal. Beyond that our decision does not go. I say this because some general observations were made by the learned judge in the Court below, as to which I desire to express no opinion. All that we decide is that in any case where the facts are, as I hold them to be here, in substance identical with the facts in *In re London and General Bank* (1), that case must be treated as an authority. For these reasons I think that this appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. There cannot be a doubt that we are bound by *In re London and General Bank* (1), and the real question is whether or not the present case can in substance be distinguished from that case and from the reasoning which led the Lords Justices to the conclusion that in that case the auditor was an officer of the company. Three points of distinction have been suggested. The first is that, in *In re London and General Bank* (1), the auditors were officers by statute; but it was pointed out by the counsel for the respondent that, although that was so, in substance Table A was incorporated in the articles. The next point was that the articles of the bank contained a definition clause which included auditors as officers, whereas no such clause existed in the present case; and the third point was that the indemnity clause in the articles of the bank referred to directors, auditors, and other officers, whereas the indemnity clause in the present case does not mention auditors. In my opinion we should be frittering away the judgment in *In re London and General Bank* (1) if we were to attempt to distinguish the present case from it. Being bound by that decision, I say that in any case which comes within the terms of that case the auditor is an officer of the company. Further than that I am not prepared to go on the present occasion.

(1) [1895] 2 Ch. 166.

Rigby L.J. I am also of opinion that in this case we are bound by the decision of this Court in *In re London and General Bank*. (1) I cannot see any substantial distinction between these clauses which were made compulsory on the company by the Act of 1879 and the articles in the present case; and although in the articles in the previous case there were minor differences, in my opinion they are not sufficient to differentiate the two cases, and we are bound loyally to follow that case. I give no kind of opinion one way or the other upon the general questions which are raised in the judgment of Vaughan Williams J.

Solicitors: *Collyer-Bristow, Russell, Hill & Co.*; *Robbins, Billing & Co.*

H. C. J.

ALCOY AND GANDIA RAILWAY AND HARBOUR COMPANY *v.* GREENHILL.

[1893 A. 1201.]

Practice—Counter-claim—Defendant to Counter-claim not Party to original Action—Right to deliver Counter-claim—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Supreme Court*, 1883, *Order* XXI., *rr.* 11, 12, 13, 14.

A person not a party to an action, who is brought in by the original defendant as a defendant to a counter-claim, cannot counter-claim against the original plaintiff and defendant.

Street v. *Gover* (2 Q. B. D. 498) followed.

Toke v. *Andrews* (8 Q. B. D. 428) distinguished.

Appeal by the Trustees, Executors and Securities Insurance Corporation against an order made by Stirling J., striking out their counter-claim in the action.

The action was brought by the Alcoy Company against their contractors, Greenhill and others, who carried on business under the firm of Lucien Ravel & Co., claiming certain relief against the defendants.

The defendants delivered a defence and counter-claim, to

(1) [1895] 2 Ch. 166.

C. A. 1895 ALCOY, &c., COMPANY v. GREENHILL.

which the Alcoy Company and the Trustees, Executors and Securities Insurance Corporation were made defendants.

The Trustees, Executors and Securities Insurance Corporation then delivered a defence and counter-claim, to which the Alcoy Company and the contractors were made defendants.

The Alcoy Company applied to Stirling J. to strike out the counter-claim of the Trustees, Executors and Securities Insurance Corporation, on the ground (inter alia) that the corporation were not defendants to the original action.

Stirling J., on the authority of *Street* v. *Gover* (1), held that a defendant to a counter-claim, who is not a party to the original action, is not entitled to deliver a counter-claim himself, and ordered the counter-claim to be struck out, but he gave leave to appeal.

The Trustees, Executors and Securities Insurance Corporation appealed.

E. C. Macnaghten, for the appellants. The corporation, being parties brought in as defendants to a counter-claim by the original defendant against the original plaintiff, are themselves entitled to counter-claim against the original plaintiff and defendant in respect of matters arising out of the same transactions. In deciding against the corporation upon this question, Stirling J. simply followed the judgment of the Queen's Bench Division in *Street* v. *Gover* (1), giving us, however, leave to appeal. I accordingly contend that in *Street* v. *Gover* (1) the Court put too narrow a construction upon the Judicature Act and the Rules. This seems to have been the view taken of that case by Field J. in *Toke* v. *Andrews*. (2) In defining the rights of third parties the Judicature Act of 1873 enacts in s. 24, sub-s. 3, that every person served by a defendant with a third-party notice shall be deemed a party to the cause, "with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." The object of the Legislature was to avoid multiplicity of actions, and to have, where it is possible, all the questions arising out of a transaction tried between all the parties thereto in one proceeding. One

(1) 2 Q. B. D. 498. (2) 8 Q. B. D. 428, 432.

of the rights of the corporation in respect of their defence is to counter-claim against their own plaintiff and make him a defendant, and they may join any other person as a defendant to their counter-claim; and why not the original plaintiff? The words of sub-sect. 3 of s. 24 of the Act of 1873 are wide enough to embrace this counter-claim, and should receive a liberal construction.

[RIGBY L.J. Where are you to stop?]

Upon the Acts and Rules there is no limit when the persons are all parties to the same transaction: Rules of the Supreme Court, 1883, Orders XIX., r. 3; XXI., rr. 10, 11, 12, 14 (1); XXIII., r. 4; *Beddall* v. *Maitland*. (2) If there be any inconvenience in trying a counter-claim at the same time as the original action, rule 15 of Order XXI. gives the Court power to exclude the counter-claim.

Mulligan, for the Alcoy Company. *Street* v. *Gover* (3) is a clear decision that a defendant to a counter-claim, who is not a party to the original action, is not entitled to deliver a counter-claim. That case was decided in 1877 on the construction of rule 8 of Order XXII. of the Rules of the Supreme Court of 1875, which were then in force. That rule is identical with rule 14 of Order XXI. of the Rules of the Supreme Court of 1883 now in force. That decision has been acted on ever since in practice. It was not impugned by *Toke* v. *Andrews* (4), which is entirely distinguishable. The question there was, whether the plaintiff could, in his reply to the defendant's counter-claim, counter-claim in respect of matter arising after the issue of the writ in the original action. If the appellants' argument is well founded, the third party, when he delivers his counter-claim, might bring in a fourth party as defendant, and that fourth party might then deliver a counter-claim, and so the thing might go on, until the action, as was said by the judges in *Street* v. *Gover* (3), would be rendered untriable.

Rule 14 expressly provides that a defendant to a counter-claim

(1) Rule 14: "Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim."

(2) 17 Ch. D. 174.

(3) 2 Q. B. D. 498.

(4) 8 Q. B. D. 428.

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may deliver a "reply," but it says nothing about a "counter-claim." The word "reply" does not include "counter-claim."

[He also referred to Order XIX., r. 3; Order XXI., r. 16; *Vavasseur* v. *Krupp* (1); *Eden* v. *Weardale Iron and Coal Co.* (2)]

R. J. Parker, for the original defendants.

Macnaghten, in reply.

Cur. adv. vult.

1895. Nov. 27. A. L. SMITH L.J. The question is whether a decision of Mellor and Lush JJ., on a point of practice in *Street* v. *Gover* (3) in the year 1877 upon the construction of the Rules of 1875 (Order XXII., r. 8), which is identical with Order XXI., r. 14 in the Rules of 1883 now in force, is to be followed or not. Stirling J. followed it, but gave leave to appeal.

It is argued that that decision is wrong, and that the practice in force during the last eighteen years has been wrong, and that this Court should now reverse the decision given in 1877, and alter the practice.

I should be extremely loth to do anything of the kind, and, unless fully convinced that the decision was wrong, I most certainly should refuse to do so, more especially as, since the decision, the old Rules of 1875, upon which it was given, have been replaced by the Rules of 1883, which have subsequently been often altered and amended, and yet the old Order XXII., r. 8 of 1875, with knowledge of the decision upon it, was re-enacted in 1883, and remains still untouched, which shews that no inconvenience has been felt in practice in adopting the construction put on the rule by Mellor and Lush JJ. in 1877.

The question is whether, when a defendant to an action brings in another person in order to counter-claim against him and the plaintiff, which the defendant is entitled to do by virtue of s. 24, sub-s. 3 of the Judicature Act, 1873, and Order XXI., r. 11, that person is, under rule 14 of that Order, entitled, not only to defend himself against the counter-claim of the defendant, but also himself to raise a counter-claim against the original defendant and the plaintiff.

(1) 15 Ch. D. 474. (2) 28 Ch. D. 333. (3) 2 Q. B. D. 498.

By Order XXI., r. 14: "Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim." Mellor and Lush JJ. held that the word "reply" in this rule did not embrace a counter-claim, and so the practice has been ever since.

I would point out the result, if the person so brought in by a defendant can counter-claim as is now suggested. He was no party to the original plaintiff's action. The plaintiff wanted nothing from him. All that the plaintiff wanted was something from the defendant. But it is said that the defendant, who alleges that he wants something from the plaintiff and the person thus brought in, in order that he (the defendant) may obtain relief for himself, can thus bring in a third person and force him upon the plaintiff, so that the plaintiff is driven to a contest with that person, although the plaintiff has no claim whatever against him, and has never litigated, and does not desire to enter into litigation, with him at all.

It strikes me as odd that the rules should allow this to be done. But it is said that they do, and that Field and Huddleston JJ. in *Toke* v. *Andrews* (1), in the year 1882, in reality so held, and that their judgment is preferable to that of Mellor and Lush JJ. In my opinion, Field and Huddleston JJ. did not decide that which it is now said they did. In the first place they had not to determine the construction of Order XXII., r. 8. What they did decide was this—that, where a plaintiff sued a defendant and that defendant counter-claimed against the plaintiff, the plaintiff could counter-claim against that defendant for a cause of action which accrued to the plaintiff after the issue of the writ. That is all that those learned judges decided.

It will be seen that their decision was that an original plaintiff can counter-claim against the counter-claim of an original defendant, and for a cause of action which accrued after the issue of the writ, but it is not a decision that a person brought in by an original defendant can counter-claim against the original plaintiff. It is true that Field J. pointed out that

(1) 8 Q. B. D. 428.

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A. L. Smith L.J.

Lush J. had doubts as to whether he was placing the correct construction upon the word "reply" in Order XXII., r. 8; but he and Mellor J. did, nevertheless, expressly hold that the word "reply" did not include a counter-claim, and so the practice has remained until the present time.

In my judgment, if this construction of the rule is to be altered, the alteration must be made by the Rule Committee, by adding the word "counter-claim" after the word "reply." Whether the Committee would think it right to do so I much doubt, seeing that, as was pointed out by Mellor and Lush JJ., the alteration would produce such a complexity as would render an action untriable.

I should notice that Order XXI., r. 14 applies to actions in both the Chancery and the Queen's Bench Divisions. If the alteration would produce no complexity in the Chancery Division, as it is said it would not, well and good; but the same construction must be placed upon the rule, whether it is being applied to a Chancery or a common law action, and if, as I have no doubt, in a common law action the complexity pointed out would arise, I prefer the construction placed upon the rule by Mellor and Lush JJ. to that now contended for, namely, that the word "reply" as used in the rule embraces a counter-claim.

In *Eden* v. *Weardale Iron and Coal Co.* (1), in which a third party was brought in by a defendant under Order XVI., r. 48, in order that the defendant might obtain indemnity or contribution from him, it was argued that that third party could counter-claim against the original plaintiff. But this Court held that he could not, and Bowen and Fry L.JJ. pointed out the inconveniences which would arise if this were allowed, and similar inconveniences would, as it appears to me, arise in the present case if the appeal were allowed.

For these reasons I am of opinion that the appeal must be dismissed, and with costs in any event.

RIGBY L.J. I have arrived at the same conclusion. Whether, if *Street* v. *Gover* (2) had come before me in the first instance,

(1) 28 Ch. D. 333. (2) 2 Q. B. D. 498.

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I should have been pressed by the reasons there given and have arrived at the same conclusion, I very much doubt. But from the first I have been strongly impressed with the great inconvenience of attempting now to interfere with a rule as to procedure which was laid down so long ago as 1877; and my hesitation arose only from a doubt which I entertained, whether *Toke* v. *Andrews* (1) had not in substance laid down a law which could not be reconciled with *Street* v. *Gover*. (2) But, after looking carefully at *Toke* v. *Andrews* (1), and the judgment of the Divisional Court delivered by Field J., I am satisfied that they did not intend to overrule, and that they carefully avoided overruling, *Street* v. *Gover*. (2) Seeing that the learned judges (like myself) apparently had some doubt about the original correctness or necessity of the decision in *Street* v. *Gover* (2), and that yet they would not act upon that doubt, I think we ought not to do so; therefore, without hesitation, after full consideration, I agree as to the inconvenience of attempting to interfere now with the decision in *Street* v. *Gover*. (2)

Solicitors: *Slaughter & May; Ashurst, Morris, Crisp & Co.; Batten, Proffitt & Scott.*

W. L. C.

C. A. 1895 Dec. 4.

BADISCHE ANILIN UND SODA FABRIK *v.* HENRY JOHNSON & CO. AND BASLE CHEMICAL WORKS, BINDSCHEDLER.

[1895 B. 4647.]

Practice — Service out of Jurisdiction — Injunction — Act to be done within Jurisdiction — Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*f*).

Manufacturers in Switzerland, in reply to a letter from retail dealers in England asking them to send 5 lbs. of a dye which they manufactured, replied by a letter in which they inclosed an invoice of the goods ordered. The invoice described the goods as "bought" by the dealers of the manufacturers, and stated that they were sent to a specified firm in Switzerland "to be held by them at your disposal." The plaintiffs alleged that the dye thus sold was an infringement of their patent, and commenced an action against the English purchasers and the Swiss manufacturers, claiming

(1) 8 Q. B. D. 428. (2) 2 Q. B. D. 498.

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an injunction. The plaintiffs, having served the purchasers, applied ex parte for leave to issue a concurrent writ and to serve notice thereof on the manufacturers out of the jurisdiction.

Held (reversing the decision of North J.), that the plaintiffs had shewn a primâ facie case, within Order XI., r. 1 (*f*), of a sale within the jurisdiction, and that the leave asked should be given.

THIS was an ex parte motion by the plaintiffs, by way of appeal from North J., who (in chambers) had refused the application, for leave to issue a concurrent writ in the action, and to serve notice thereof on the secondly named defendants, out of the jurisdiction of the Court, at Basle, in Switzerland.

The plaintiffs were the owners of an English patent for dyes. By their writ they claimed an injunction to restrain the defendants, their servants and agents, from importing into England and from manufacturing, selling, supplying, and using in England dyes manufactured according to the patent, or in any manner only colourably differing from the same, and generally from infringing the plaintiffs' rights under the patent. The plaintiffs also claimed damages and other consequential relief. According to the affidavits filed on behalf of the plaintiffs, the secondly named defendants, who were manufacturing chemists at Basle, in Switzerland, manufactured at their works at Basle a dye which was an infringement of the plaintiffs' patent, the plaintiffs' dye being known in the trade as "Yellow T." On June 7, 1895, the defendants, Henry Johnson & Co., who were drysalters in London, sent to the second defendants by postcard the following order: "Please send us by post immediately 5 lb. Yellow T for wool 109." On June 11 the second defendants replied: "In reply to your postcard of 7th inst., we are sending you inclosed invoice for the 5 lb. Yellow for wool you ordered, asking you kindly to credit us for the amount, 16*s.* 6*d.* In order to induce you to further orders, we are willing to reduce our price for this product to 3*s.* 2½*d.* per lb. in kegs, usual terms, and we hope we shall be favoured with your more important commands." The inclosed invoice was addressed to Henry Johnson & Co., and stated that the goods were "bought of the Basle Chemical Works, Bindschedler," and that they were "sent to Messrs. Niebelgall & Goth, Basle, to be held

by them at your disposal." The goods were described as one package containing 5 lbs. Yellow T for wool, at 3*s.* 3½*d.* per lb. —16*s.* 6*d.* Johnson & Co. were served with the writ, and they then stated that they did not intend to enter an appearance, but were willing to submit to a perpetual injunction.

North J. was of opinion that there had been no sale within the jurisdiction; but the point mainly urged before him was that the Basle Company were necessary or proper parties to the action against Johnson & Co., and that rule 1 (*g*) of Order XI. applied. The plaintiffs appealed.

Moulton, Q.C., and *W. N. Lawson*, for the plaintiffs. The case is within (1) rule 1 (*f*) of Order XI. of the Rules of the Supreme Court.

The plaintiffs seek to restrain acts done within the jurisdiction. The evidence shews that the Basle Company have been in reality selling the infringing article within the jurisdiction, and that they threaten and intend to continue doing this. The contract for sale was entered into with the defendants Johnson & Co.; the delivery of the goods to Niebelgall & Goth was a mere sham. Those persons were clearly the agents of the Basle Company. If the plaintiffs cannot sue the Basle Company here they will be practically without remedy. It would be impossible to sue, or indeed to detect, all the retail dealers in this country who purchase from the Basle Company, and there is no adequate patent law in Switzerland.

[A. L. SMITH L.J. referred to *Marshall* v. *Marshall*. (2)]

In that case the sale was to an agent; here it is made direct to the English purchaser. In *Elmslie* v. *Boursier* (3) an injunction was granted against a foreign manufacturer to restrain him from selling in England goods which infringed

(1) By Order XI., "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever (inter alia)

"(*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(2) 38 Ch. D. 330.

(3) L. R. 9 Eq. 217.

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the plaintiffs' patent. *Von Heyden* v. *Neustadt* (1) is to the same effect.

LINDLEY L.J. No doubt this case is of extreme importance. In my opinion the plaintiffs have made out a primâ facie case within rule 1 (*f*) of Order XI. for giving leave to issue a concurrent writ and to serve notice of it on the Basle Company abroad. It is clear that the plaintiffs are bonâ fide seeking an injunction to prevent the sale in England of an article infringing their patent. The invoice contains a clause which primâ facie the Basle Company were not authorized to insert in it; so far as appears they had not been requested by Johnson & Co. to send the goods to Niebelgall & Goth. Primâ facie Niebelgall & Goth were agents of the vendors employed to send the goods to England; and, if that be so, the sending the goods to them was a colourable proceeding to conceal the fact that the Basle Company sent their goods and sold them in this country. This, however, is an ex parte application, and of course if after the Basle Company have been served they should come here and ask the Court to discharge the order for service, they will not be prejudiced by anything we have said to-day. I think the leave which the plaintiffs ask should be given.

A. L. SMITH L.J. and RIGBY L.J. concurred.

Solicitors: *J. H. & J. Y. Johnson.*

(1) 14 Ch. D. 230.

W. L. C.

WAYNES MERTHYR COMPANY *v.* D. RADFORD & CO.

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1895
Nov. 22.

[1895 W. 1499.]

Practice—Particulars— Discovery—Fraud — Rules of Supreme Court, 1883, *Order* XIX., *r.* 6.

There is no hard and fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars; the Court will exercise its discretion upon all the circumstances in each case.

In an action by a colliery company against coal merchants, in which the plaintiffs alleged that they had lost business by reason of the fraudulent acts of the defendants, giving one specific instance of fraud in their statement of claim (which was admitted by the defendants), and alleging that "on divers other occasions" the defendants had taken orders from "divers other persons" for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs:—

Held, that as the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs had not, the defendants were not entitled to particulars before giving discovery.

Dictum of Kay L.J. in *Zierenberg* v. *Labouchere* ([1893] 2 Q. B. 189) explained.

MOTION to discharge an order made in chambers which raised the question whether discovery should or should not precede particulars.

The plaintiffs were the proprietors of a colliery in South Wales, from which smokeless steam coal was obtained; the defendants were coal merchants in London.

The plaintiffs' case was that they had lost business by reason of the fraudulent acts of the defendants, and they claimed an injunction restraining the defendants from selling or describing as coal supplied to them by the plaintiffs, or as coal from the plaintiffs' collieries, coal which had not in fact been so supplied or got, delivery up of four printed forms of permit, which had been given to the defendants' agent, and 10,000*l.* damages.

It was alleged by the statement of claim, delivered in July 1895, that all coal sent from the plaintiffs' colliery was despatched in railway trucks direct from the colliery, the

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trucks and coal being weighed at the weigh-bridge there; that it was the duty of the man in charge to write on the appropriate printed form, used for such purpose by the plaintiffs, the respective numbers of the trucks despatched, with the date, and the weights of the trucks and coal, and the name of the station to which they were despatched, and the name of the consignee: that this form when so filled in and signed was called a "permit."

The plaintiffs gave a specific instance in March 1895, when the defendants had supplied 168 tons of coal to the City of London Brewery Company, fraudulently representing to the company that the coal was purchased by them from the plaintiffs; and alleged that this fraud had been perpetrated by the use of two out of six "permits" which one of the defendants' agents had recently obtained from the servant of the plaintiffs, who kept the blank forms of "permit." The statement of claim contained the following paragraphs, on which the question in this case arose:—

"5. The defendants have on divers other occasions taken orders from the said City of London Brewery Company and divers other persons, for coal gotten from the plaintiffs' mines; and in response to such orders they have fraudulently supplied and sold to such company and persons, coal which was not purchased from the plaintiffs or gotten from the said mines, and which was of a quality inferior to that of coal from the said mines, and have represented to such company and persons that the coal so supplied and sold was coal purchased from the plaintiffs and gotten from the said mines."

"6. By reason of the sale by the defendants of coal as aforesaid, the plaintiffs have lost the profits which they would have made if the coal sold as aforesaid had been purchased from the plaintiffs; and other coal merchants finding (as the fact is) that the defendants were selling what purported to be, and was supposed by such other coal merchants to be, coal from the plaintiffs' mines, at a price lower than such other coal merchants could sell coal from the plaintiffs' mines, and even lower than they could purchase such coal from the plaintiffs, have accused the plaintiffs of unduly favouring the defendants," and

consequently "have ceased to deal with the plaintiffs or to try to procure orders for their coal." Then followed the names of two London coal merchants who had for the reasons aforesaid ceased to deal with the plaintiffs.

"7. By reason of the sale of coal by the defendants as aforesaid, the coal from the plaintiffs' mines has suffered in reputation and value, and the demand therefore has decreased, and the plaintiffs have lost customers and otherwise suffered damage."

There was not any allegation, that until the plaintiffs had obtained discovery and inspection of the defendants' books, they could not give better particulars than those already given.

The plaintiffs had obtained an interim injunction restraining the defendants from selling or describing as coal supplied to them by the plaintiffs, coal which had not in fact been so supplied; and at the hearing of this application the defendants admitted they were technically guilty of the charge made against them as to the bulk of the 168 tons supplied to the City of London Brewery Company, and expressed their regret for the same, stating that one of their clerks had without their knowledge wrongfully made use of two of the plaintiffs' "permits," that he had been severely reprimanded and would have been summarily dismissed had he not been an old servant.

On August 8 the defendants, before putting in their defence, applied by summons for particulars as to paragraphs 5, 6, and 7 of the statement of claim, and on the same day the plaintiffs also applied by summons for discovery and inspection of documents.

Chitty J., in chambers, made an order directing particulars to be given before discovery, and that unless such particulars were delivered within four days all further proceedings in the action were to be stayed until the delivery thereof.

The plaintiffs now moved to discharge or vary the order.

Byrne, *Q.C.*, and *W. C. Dare*, for the motion. The plaintiffs have a substantial cause of action against the defendants: they have given several instances of fraud which are not denied, and they have good grounds for believing that there are other instances of fraud committed by defendants or their clerks,

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though they are unable to give exact particulars until after discovery. The defendants have the means of knowing all the facts in dispute, the plaintiffs have not; and on this ground alone we are entitled to discovery before giving particulars. If we do not get this discovery, we shall not be able substantially to comply with the order already made, and proceedings will consequently be stayed, and there will be a miscarriage of justice. The order made in chambers should therefore be discharged, or varied by directing discovery to precede particulars.

Farwell, Q.C., and *R. Younger*, for the defendants. A plaintiff is not allowed to bring a fishing action, charging fraud generally, in the hopes of being able to pick out some instances by roving through the defendants' books; where a plaintiff alleges fraud he must give particulars under Order XIX., r. 6. We admit that the defendants were technically, though not morally, guilty of one of the instances pleaded—for this we have already expressed our regret; we also admit that if the plaintiffs do not deliver proper particulars we shall avail ourselves of the order to stay proceedings. According to the judgment of Kay L.J. in *Zierenberg* v. *Labouchere* (1), it is only in cases where a fiduciary relationship exists between the parties that discovery is ordered to precede particulars. The rule is correctly given in the Annual Practice, 1896, p. 613: "In some cases a party may be allowed discovery for the purpose of giving particulars; but it has never been allowed in the absence of some relationship between the parties except under exceptional circumstances, such as one party keeping back something which the other was entitled to know." There is no fiduciary relationship in this case, and the general rule should therefore be followed: the order made in chambers was the right one.

Byrne, Q.C., in reply. *Zierenberg* v. *Labouchere* (1) does not lay down any such proposition as that contended for by the defendants. Discovery was ordered to precede particulars in *Millar* v. *Harper* (2); *Sachs* v. *Speilman* (3); *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (4); and the reasons given in the judgments in these cases applies to the present

(1) [1893] 2 Q. B. 183, 189.
(2) 38 Ch. D. 110.
(3) 37 Ch. D. 295.
(4) [1893] 3 Ch. 122.

case; the plaintiffs have the means of information which we have not. We do not wish to rove through the plaintiffs' books generally; we limit our application to discovery for four years prior to the writ. We have alleged one instance of fraud, in respect of which there has been no defence, though there may have been an explanation, and we have a strong suspicion that there are divers other occasions where similar frauds have been committed. There is no absolute rule as to the class of cases in which the Court will order particulars first or discovery first, but the Court will look at the circumstances in each case.

Farwell, Q.C., in reply on fresh cases cited. In *Millar* v. *Harper* (1) no discovery of books or documents was required; in *Sachs* v. *Speilman* (2) the plaintiff alleged in his claim that he was unable to give particulars until he had obtained discovery and inspection; there is no such allegation here, besides in that case there was a fiduciary relation between the parties which makes all the difference. *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (3) was the case of an inquiry as to damages after judgment. There is nothing in any of these cases to disturb the general rule that particulars precede discovery except where there is a fiduciary relation between the parties.

CHITTY J. The question is whether the plaintiffs should deliver particulars before obtaining discovery and inspection of the defendants' books, or whether discovery should be given before particulars are delivered.

The plaintiffs' case is founded on fraudulent misrepresentation by the defendants in passing off coal not from the plaintiffs' colliery as coal obtained from that colliery. On the statement of claim the plaintiffs give an instance when two distinct frauds were committed, perpetrated as it turns out by a clerk of the defendants when supplying coal to the City of London Brewery Company; and then the statement of claim at paragraph 5 goes on to allege that on "divers other occasions" the defendants had taken orders from the same brewery company and "divers

(1) 38 Ch. D. 110. (2) 37 Ch. D. 295.
(3) [1893] 3 Ch. 122.

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other persons" for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs. The order made in chambers was for delivery of particulars before discovery, and in default of complying with this order proceedings were to be stayed. The plaintiffs now frankly state that they cannot substantially comply with this order for particulars; they say that they have information in their possession tending to support their case as to the "divers other occasions" where fraud, they believe, has been committed, but that they are not in a position to frame accurate particulars of these instances of fraud, and they say that the best particulars they could deliver under existing circumstances would be practically of no assistance to the defendants, and then they say they fear that the defendants will come to the Court, and ask to be relieved from any obligation to make discovery, because there has been no substantial compliance by the plaintiffs with the order for particulars, and to have proceedings stayed. The defendants candidly avow at the Bar that they intend to adopt this course if insufficient particulars are delivered, and under these circumstances it is most material for me to decide whether particulars should precede discovery, or discovery should precede particulars.

The argument for the defendants is founded chiefly on a dictum in the judgment of Kay L.J. in *Zierenberg* v. *Labouchere* (1), from which the defendants' counsel extract this proposition, that except in cases where a fiduciary relationship exists between the parties, particulars always precede discovery. I am unable to deduce any such proposition from the Lord Justice's observations in that case; true he did explain the rights of a plaintiff charging fraud against an agent, or breach of trust against his trustee, and he put it on these grounds (2): "There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the Court in requiring the defendant to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge

(1) [1893] 2 Q. B. 183. (2) [1893] 2 Q. B. 189.

which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery, and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made." The Lord Justice did not lay down any such general proposition as that contended for by the defendants' counsel, and in my opinion there is no such general rule. There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars; but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances.

Now, on the facts alleged in the statement of claim, it cannot be said that the plaintiffs are presenting a fishing case: there has already been a motion for an interim injunction, when the defendants admitted the fraudulent use of two of the plaintiffs' permits, one of the specific charges made against them in the statement of claim. True, the defendants excuse themselves by saying that they did not know of this fraud personally, and that it had been committed by one of their clerks, who had already been severely reprimanded. The nature of the fraud was this: six of these blank permits had been given to the defendants, it was supposed for a lawful purpose, and two of these forms were made use of to prove the origin of the coal supplied to the City of London Brewery Company. The clerk who filled them up is not before me to justify or explain his conduct, but on the facts as they stand, this filling up of these two blank forms was a designed and deliberate fraud; and the fact remains that the defendants still retain this clerk in their employ as an old and faithful servant. Then there is the further fact that the four other blank forms of permit are not accounted for; the defendants' counsel are instructed to say that they cannot now be found.

Then, again, the plaintiffs say that they have lost business by reason of the fraudulent acts of the defendants, and they give in paragraph 6 of the statement of claim two instances of firms who have ceased to deal with them. The defendants in their affidavit say that they have had friendly business

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relations for the last thirty years with the plaintiffs, and that during that time they have purchased from the plaintiffs quantities of coal varying from 70,000 to 15,000 tons annually, but that the annual quantities so purchased have decreased during late years. I am unable to see that this helps the defendants; it seems to me that it is rather in favour of the plaintiffs. I began by saying that this was not a fishing case, but one having a substantial foundation, and it is necessary to go into these details in order to arrive at a just conclusion. The defendants by a careful examination of their books have the means of discovering whether any other frauds similar to those alleged have been committed; the discovery claimed by the plaintiffs is limited to four years from the date of the writ, and it seems to me that this is a case in which, having regard to the position of the parties and the admitted facts, and having regard to the circumstance that many of these alleged frauds are within the defendants' means of knowledge, and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars, and I think this order should be made for the purpose of effecting justice between the parties, because I see the use which the defendants may be able to make of the order for particulars as originally made in chambers, in which event the plaintiffs might fail to obtain justice.

The usual argument has been addressed to me, that the plaintiffs ought not to be allowed to rove through the defendants' books in order to make out a case; but for the reasons already given I do not think it is applicable here.

The result therefore is, that the order will be varied by directing discovery to precede particulars.

Farwell, Q.C., asked for leave to appeal, as they considered the case one of extreme importance.

CHITTY J. I have been carefully through all the leading authorities during the argument, and I do not consider that I am in any way departing from the reported decisions: for these reasons I think I ought not to grant you leave to appeal.

Solicitors: *Heath, Parker, & Brett*; *Radford & Frankland.*

W. C. D.

VINE *v.* RALEIGH.

CHITTY J.

1895

Nov. 27.

[1865 V. 3.]

Will—Act of Parliament—Settlement—Next of Kin—Executor of Deceased Next of Kin—Tenants for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5; *s.* 58, *sub-s. I. cl. v.—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98), *s.* 1.

The words "Act of Parliament" in the definition clause, s. 2, sub-s. 1, of the Settled Land Act, 1882, are not confined to private Acts of Parliament, but include general Acts, such as the Thellusson Act.

So where under a will a direction to accumulate was void under the Thellusson Act, and the accumulations went to the testator's next of kin:—

Held, that the will and the Act together constituted a settlement within the meaning of the Settled Land Act, 1882.

The executrixes of a deceased next of kin and the surviving next of kin were under the joint operation of the will and the Thellusson Act entitled for the life of another to receive the rents directed to be accumulated:—

Held, that they had jointly the powers of a tenant for life within the meaning of the Settled Land Act, 1882.

Summons on the part of Sir Edward Cholmeley Dering and Lord Richard Howe Browne as trustees of the will of Edward Ward Walter Raleigh, that they and the receiver in the action might be at liberty to present to the Court a petition under the Settled Estates Act, 1877, for power to grant to the Commissioners for executing the office of Lord High Admiral, a lease of part of a certain estate called the Mount Boone Estate, described in a conditional contract dated June 6, 1895, made between the applicants of the one part and the commissioners of the other part.

Edward Ward Walter Raleigh, by his will dated in 1864, after appointing Sir Edward C. Dering and Charles Vine his executors, and directing that all property which he might leave in trust was to be in their confidence and custody, directed that all the residue of his invested or moneyed property should eventually, together with accumulations, be invested in landed estate; and out of the interest derived on his property invested in funds or on rental of land, he directed that the sum of

CHITTY J. 1895 VINE v. RALEIGH.

500*l.* should be paid yearly to his nephew, Edward Walter Raleigh, for his life, and that the surplus over and above such annuity should from time to time during the lifetime of his nephew be expended in the purchase of additional land or in the improvement of the landed estate and the property, and that should his nephew marry, and at his death leave a son, such son should inherit a life interest in the whole of the landed property, subject to certain conditions, and that the property under similar engagements should pass on to the lawful male heir of his nephew in succession for ever, with remainder over to his nephew W. R. Amesbury, and to his male heirs after him, in the event of his nephew Edward Walter Raleigh dying without male issue. The will contained no power of leasing. The testator died on January 22, 1865, and shortly afterwards this suit was instituted for administration of his estate, and a receiver was appointed.

In 1874 the applicants, the then trustees of the will, purchased with the approval of the judge the Mount Boone Estate. Edward Walter Raleigh was at that time married, and the defendant W. F. C. Raleigh, who was then an infant, was his eldest son, and the annuity of 500*l.* a year was being paid out of the income of the estate, and the residue of the income was being accumulated.

By an order of July 4, 1883, it was ordered that the applicants should be at liberty to present such petition under the Settled Estates Act, 1877, for obtaining the leasing powers thereby conferred as they might be advised. (1) A petition was accordingly presented, and by the order made thereon dated July 12, 1884, it was ordered that general powers of granting occupation leases of a small portion of the Mount Boone Estate (the particulars of which were set out in the schedule to the order) should vest in the applicants, the trustees of the will, and the survivor of them, or other the trustees or trustee for the time being of the said will.

By an order dated March 11, 1886, it was ordered that the receiver should, after keeping down the annuity of 500*l.* per annum, and after maintaining in good habitable repair the

(1) 24 Ch. D. 238.

houses and tenements on the property subject to the trusts of the will, divide the residue of the balances which should from time to time be certified to be due from him as from January 22, 1886 (being twenty-one years from the death of the testator), and during the life of Edward Walter Raleigh, or until further order, into two equal moieties, and should pay one moiety to the said Edward Walter Raleigh as one of the next of kin of the testator, and the other moiety to the defendants Octavia Alexander and Jane Dorothea Curtis, as executrixes of the late defendant Caroline Amesbury, who was the other next of kin of the testator.

Part of the property comprised in the contract referred to in the summons not being included in the schedule to the order of July 12, 1884, it therefore became necessary to obtain further powers of leasing, and the question was whether, having regard to the order of March 11, 1886, the trustees and the receiver were the proper persons to present a petition under the Settled Estates Act, 1877, or whether Edward Walter Raleigh, and the defendants, Octavia Alexander and Jane Dorothea Curtis, as the executrixes of Caroline Amesbury, were not the proper persons as constituting the tenant for life under the settlement within the meaning of the Settled Land Act, 1882.

Byrne, Q.C., and *Wace*, for the applicants. The question here is whether the application ought to be made under the Settled Estates Act, 1877, or the Settled Land Act, 1882. The definition of settlement in the two Acts is practically identical. When the order of July 4, 1883, was made, the period of twenty-one years allowed by the Thellusson Act had not expired. Sect. 1 of that Act enacts that in every case where any accumulation is directed otherwise than as allowed by the Act, such direction shall be null and void, and the rents so directed to be accumulated shall, so long as the same shall be directed to be accumulated, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

We submit that the will and the Thellusson Act, by the combined operation of which the land is now settled, constitute

CHITTY J. 1895 VINE v. RALEIGH.

a settlement; but we say that the surviving next of kin of the testator, and the executrixes of the deceased next of kin have not the powers of a tenant for life within the meaning of the Act, and that the procedure should be taken under the Settled Estates Act, 1877.

Levett, Q.C., and *S. Dickinson*, for the surviving next of kin, and his eldest son. We submit that the executrixes of the deceased next of kin are persons beneficially entitled within the meaning of the Act.

Farwell, Q.C., and *Yate Lee*, for the executrixes of the deceased next of kin. We are clearly within s. 58, sub-s. I. cl. v. of the Act.

CHITTY J. Under the will the personal estate has been laid out in the purchase of real estate. The real estate purchased was settled by the will. The will, however, directed that the rents should be accumulated for a period which in the result has exceeded the twenty-one years allowed by the Thellusson Act. That Act avoids the accumulations after the lapse of that time, and directs that the rent shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed. The period of twenty-one years elapsed in January, 1886, and, but for the Act, the accumulations would still be going on. The persons entitled under the statute are the testator's next of kin consisting of two persons, one of whom is alive and the other is dead. The surviving next of kin is before the Court and the executrixes of the deceased next of kin.

The first question is whether there is a settlement affecting the rents in the present circumstances of the case within the meaning of s. 2 of the Settled Land Act, 1882, and in my opinion there is. Without reading the whole of the definition, it is enough to say it includes a will and an Act of Parliament, and in my opinion, putting the will and the Act together, there is a settlement. It is not necessary to consider what would have been the result if the Thellusson Act had merely avoided the direction to accumulate, the Act goes beyond that, and

directs to whom the rents directed to be accumulated contrary to the Act are to go. I hold, therefore, that the case falls within the Settled Land Act, 1882.

Then it is said that the surviving next of kin and the executrixes of the deceased next of kin constitute a tenant for life, or have the powers of a tenant for life within the meaning of the Settled Land Act, 1882, either by virtue of s. 2, sub-s. 5, or s. 58, sub-s. I. cl. v. In my opinion it is not necessary to say whether the case falls under one section or the other. It is plainly within s. 58, sub-s. I. cl. v. It is quite possible there may be a question with regard to the executrixes under s. 2, sub-s. 5, whether they are beneficially entitled to possession. My present opinion is that for this purpose they are persons beneficially entitled, because they alone can receive the share of the deceased next of kin, and it would be going, I think, too far to say that the persons entitled under the will of the next of kin are the persons beneficially entitled to possession. But it is not necessary to decide this point. I answer the question raised by saying that the surviving next of kin and the executrixes of the deceased next of kin have the powers of a tenant for life within the meaning of the Settled Land Act, 1882. The declaration will be that the persons to whom the surplus rents are directed to be paid have the powers of a tenant for life within the meaning of the Settled Land Act, 1882.

Solicitors: *Patersons, Snow, Bloxam & Kinder; Petch & Smurthwaite; Peacock & Goddard.*

G. M.

NORTH J.
1895
Nov. 9, 18.

CHOLDITCH *v.* JONES.

[1894 C. 2309.]

Practice—General Order under Solicitors' Remuneration Act, 1881, *Schedule I., Part I., r.* 11—*Scale Fee for Conducting Sale.*

If the purchaser, in pursuance of a condition of sale, pays a fee to the auctioneer, the solicitor is not entitled to the scale fee for conducting a sale by auction.

If the solicitor himself pays the auctioneer, the solicitor is entitled to the scale fee.

THE plaintiffs in this action were mortgagees of certain real estate and a policy of insurance. They had sold the real estate by auction. The action was for foreclosure of the policy. The plaintiffs' solicitors' costs in respect of the sale by auction had been taxed.

This was a summons on behalf of the plaintiffs to review the taxation. The whole property subject to the mortgage was put up for sale by auction, together with other property, in six lots. The first three lots comprised the real estate subject to the mortgage; the fourth lot comprised the policy of insurance. The first three lots were sold for the respective prices 12*l.* 10*s.*, 80*l.*, and 320*l.* The fourth lot was not sold because the reserved price of 507*l.* 10*s.* was not reached. The solicitors delivered a bill of costs for 36*l.* 13*s.*, including scale fee for deducing title 11*l.* 5*s.*, and four sums of 5*l.* each as minimum scale fee in respect of the four several lots put up for sale. The taxing master disallowed these sums, and in lieu thereof allowed a quantum meruit of 3*l.* 3*s.* The conditions of sale provided for payment to the auctioneer by the several purchasers of a specified sum for each lot. The solicitors did all the work connected with conducting the sale except actually receiving bids and knocking down the lots.

The taxing master overruled objections to the taxation, and held that the scale fee for conducting the sale was not applicable on the grounds, first, that the solicitors did not do all the work of conducting the sale; secondly, that the payment by the

purchasers of fees to the auctioneer was a payment by the vendors of auctioneer's commission within the meaning of the provision in rule 11 of Schedule I., Part I., of the general order made under the Solicitors' Remuneration Act, 1881.

R. F. Norton, for the applicants. The taxing master must have been wrong in holding that it is necessary for a solicitor himself to do all the work connected with conducting a sale by auction in order to be entitled to the scale fee, for it would be only in a very few cases, if any, that a solicitor could perform the whole of an auctioneer's duties; that construction of Schedule I. to the general order under the Solicitors' Remuneration Act would therefore render the provision for a scale fee for conducting a sale inoperative. It has been decided that, where the vendor pays a fixed charge to the auctioneer, such charge is a commission within the meaning of rule 11 of Schedule I., Part I., of the general order: *Drielsma* v. *Manifold* (1); so that in that case a scale fee cannot be charged. It cannot, however, be said that the payment by the purchaser of a small fee to the auctioneer is equivalent to payment of commission by the vendor. Such a payment by the purchaser would in no way prejudice the vendor.

1895. Nov. 18. NORTH J. (after stating the facts). The taxing master allowed the 11*l.* 5*s.* for deducing title; and no objection is made to that. He disallowed the 20*l.* for conducting fees, holding that the scale did not apply; but he allowed 3*l.* 3*s.* to the solicitors as a quantum meruit for their work. That this is sufficient in itself is not disputed, in case the scale fee is not exigible.

Even if the scale did apply, the charge of 20*l.* for conducting fees is most excessive. The proper mode of ascertaining the conducting fee would have been to add together the purchase-money of the three lots sold, making 412*l.* 10*s.*, the scale percentage on which would, having regard to rule 7, have been 4*l.* 10*s.*; to which would be added also the scale percentage of 2*l.* 15*s.* on the reserved price of the unsold lot. This would

(1) [1894] 3 Ch. 100.

NORTH J. 1895 CHOLDITCH v. JONES.

have brought the conducting fee up to 7*l.* 5*s.*, instead of 20*l.*; and as that sum is more than 5*l.* no question as to a minimum charge could have arisen. To treat the sale of each lot as a separate sale, and charge a separate minimum fee in each case, was wholly unjustifiable. It was not authorized by the rules, and was in direct opposition to the decision of the Queen's Bench in *In re Onward Building Society*. (1)

The material facts which have to be added are very few. The vendors' solicitors desired to be paid the full scale charge for conducting the sale. They could do, and did, much of the work; but as they were not licensed auctioneers they could not conduct the sale in the sale-room, and had to employ an auctioneer for that purpose, who, of course, had to be paid. The solicitors wished to avoid paying his commission out of their own pockets. They could not charge it against their clients, if they were to be paid by scale. They accordingly adopted what seemed to them the ingenious device of throwing it on the purchasers, and inserted as a special condition of sale: "The respective purchasers shall pay to the auctioneer his fee, as under:—

	£	*s.*	*d.*
"Lots 1 and 2, each .	1	1	0
,, 3 . . .	5	5	0
,, 4 . . .	3	3	0"

thus escaping, as they thought, the necessity of paying the auctioneer his ten guineas and appropriating the whole scale fee. Of course, they were not bound to pay the auctioneer unless they liked: they might have left the clients to bear the auctioneer's commission in the usual way; but then they could have only charged for the work they did, and could not have charged the scale fee.

The taxing master refused to allow the conducting fee upon two distinct grounds. The first was, that it is now well settled by *In re Lacey & Son* (2), *In re Wilson* (3), and other cases, that a solicitor can only be paid the scale charge for conducting the sale when he does all the work; that, according to Lindley L.J.,

(1) [1893] 1 Q. B. 16. (2) 25 Ch. D. 301.
(3) 29 Ch. D. 790.

in *Drielsma* v. *Manifold* (1), "one of the important parts of conducting a sale by auction is taking the bidding and conducting what goes on in the auction-room"; that this was not and could not be done by the solicitors; and that they could not therefore be paid by scale. I do not agree in this conclusion. I think that a solicitor can properly be said to do all the work, within the rule and cases referred to, if he does it either himself or by proper agents whom he employs for the purpose, whether such agents be his own clerks or other persons retained for the occasion. The use of the words "by the client," in that portion of rule 11 which provides that: "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer," seems to me to recognise the applicability of the rules to a case where commission is paid to the auctioneer, so long as it is not paid by the client.

In *In re Wilson* (2) Cotton L.J. says: "The property may have been in such a state that the solicitor could not alone do all things that were necessary for the sale, but in such a case, if he claims the ad valorem remuneration, he must get them done by a person paid by himself." The cases of *In re Faulkner* (3), *In re Peace & Ellis* (4), *Drielsma* v. *Manifold* (1), and many others, all point out that, even when an auctioneer is employed, there is no objection to the solicitor being paid by scale, if he pays the auctioneer's charges out of his own pocket, so that they do not fall upon the client. If the view of the taxing-master were correct, I do not see how any solicitor, acting for a vendor selling by auction, could ever be paid by scale at all, unless he was himself also a licensed auctioneer.

The second ground taken by the taxing master was that the scale cannot be resorted to in the present case, because the auctioneer's commission is paid by the clients. That is a question of fact; and I agree with the taxing master. No doubt the clients are not charged directly with such commission: the auctioneer is not their creditor for the amount. But, in my opinion, if the burthen of such commission falls ultimately upon

(1) [1894] 3 Ch. 106.
(2) 29 Ch. D. 794.
(3) 36 Ch. D. 566.
(4) 36 W. R. 61.

NORTH J. 1895 CHOLDITCH v. JONES.

the clients—if it is not provided for by the solicitor out of the scale fee, but comes even indirectly upon the clients, and has thus to be borne by them—it is "paid by the clients" within the meaning of the rule. If the scale is to be applied, the solicitor must himself do, or pay for the doing of, all the work covered by the scale charge, and the client must not be charged directly or indirectly with any part of such expense. In *In re Wilson* (1) Cotton L.J. says: "The Act and rules were not intended to give the solicitor remuneration according to the scale where he does not do the whole of the work for which the remuneration is provided, but somebody else does and is paid by the client for part of that work." In *Drielsma* v. *Manifold* (2) Lindley L.J. says: "The real object of rule 11 is not to draw a distinction between charge and commission, but to draw a distinction between what is to fall upon the client and what is not." Again, Lord Davey says (3): "The substance of the rule appears to me to be this—that the scale fee to the solicitor is intended to include all the expenses of conducting the sale, including the auctioneer's commission, understanding by the auctioneer's commission the remuneration which is paid to the auctioneer whether for merely taking the bids or for doing other work as well." Lopes L.J. also pointed out that, unless the solicitor receiving the scale fees pays the auctioneer's remuneration, the client has to defray it twice over, as that remuneration is one of the expenses intended to be covered by the scale fee.

It is beyond all question that, even if the auctioneer's fee is paid in the first instance by the purchaser, it does ultimately fall upon the vendors, because the purchase-money is diminished by a corresponding amount. If the whole sum a purchaser pays does not go to the vendor, but part of it has to go to some other person, it is obvious that what the vendor receives is so much less. If a purchaser buys an equity of redemption, the purchase-money he would have paid for the property if unincumbered is reduced by the amount of the mortgage upon it. A purchaser who is willing to pay a vendor 1000*l.* for a piece of land if freehold will only pay him 900*l.* if the land is copyhold,

(1) 29 Ch. D. 794. (2) [1894] 3 Ch. 105.
(3) [1894] 3 Ch. 108.

and the fines and fees of the lord amount to 100*l.* Lot 1 in the present case affords a good illustration. It was sold for 12*l.* 10*s.*, the purchaser paying the auctioneer a fee of 1*l.* 1*s.* Can any one doubt that the purchase-money would have been more if no fee had been payable by the purchaser to the auctioneer? Let me put it in another way. A fee of 1*l.* 1*s.* on a purchase for 12*l.* 10*s.* is equal to a commission of eight guineas per 100*l.* Can it be doubted that a condition on a sale that each purchaser should, in addition to his purchase-money, pay to the auctioneer a commission at the rate of eight guineas for each 100*l.*, would materially diminish the price he would have been willing to give if there had been no such condition? And so as to the other lots, though the proportion of the auctioneer's commission to the purchase-money is much smaller. A purchaser does consider what the purchase would cost him, and regulates his biddings accordingly. For these reasons it is, in my opinion, quite clear that a vendor's solicitor on a sale by auction who does not himself do the auctioneer's work, or pay the fees of the person who does it, cannot charge the scale fee for conducting. To justify such a charge the auctioneer's commission must not be paid by the client either in meal or in malt; the burthen of it must not fall upon him either directly or indirectly. I have gone fully into the matter because the taxing master says that such cases as the present are not uncommon. They appear to me to fall within the letter as well as the spirit of rule 11, which cannot be evaded or reduced to a dead letter by the trick of inserting a condition of sale throwing the auctioneer's remuneration upon the purchaser. Where that is done the scale fee cannot be charged. As no one appears on the other side the summons will be dismissed without costs. The applicants must pay their own costs, which must not be added to their security.

Solicitors: *Field, Roscoe, & Co.*

D. P.

NORTH J.
1895
Nov. 27.

In re BEEMAN.
FOWLER *v.* JAMES.

[1894 B. 5124.]

Administration—Executor—Retainer—Annuity.

An administratrix, an annuitant under covenant by her intestate, whose estate is insolvent, is entitled to retain all arrears falling due during administration, but only to prove for the value of her future annuity.

THIS action was brought by a creditor for the administration of the estate of Thomas Greenwood Beeman, who died on September 25, 1894. The defendant was the administratrix of the estate of the deceased. The estate was insolvent.

By an indenture dated October 10, 1891, the deceased, in consideration of the assignment to him of certain property by the defendant, covenanted to pay the defendant a weekly sum of 6*l.*, payable every Saturday.

This was a summons by the defendant to determine whether she was entitled to retain out of the intestate's personal estate the debt due to her under the indenture of October 10, 1891.

At the time of the death of the intestate certain arrears were due to her; she claimed to be entitled to retain not only an amount equal to the arrears accrued at the time of the death of the intestate and since, but also up to the present capitalised value of her future annuity.

Gatey, for the defendant. An executor is entitled to retain in respect of instalments of an annuity not due till after the death of the testator or intestate: *Loane* v. *Casey*. (1)

He may also retain in respect of an obligation to him an amount which has not been ascertained: *In re Morris' Estate*. (2) Where an estate is insolvent and administered either in bankruptcy or in Chancery, the Court recognises the right of an annuitant to come in with the creditors and prove for the value of future instalments. Therefore, the administratrix should be allowed to retain to the extent of such value.

(1) 2 W. Bl. 965.

(2) L. R. 10 Ch. 68.

Cann, for the plaintiff. The right of retainer is a common law right—one that has never been recognised in bankruptcy, and cannot be affected by the 10th section of the Judicature Act, 1875. An actual debt is the only thing in respect of which the right of retainer exists. A person who is entitled to be paid in future is not a creditor so as to be able to commence an administration action: *In re Hargreaves*. (1)

Gatey, in reply.

NORTH J. I think the administratrix is entitled to retain the amount of all arrears down to the time any money which she claims to retain is dealt with by her. But I do not think she is entitled to retain out of the estate so much as would be necessary to satisfy the estimated value of her future annuity. The result of her being allowed to do so would be that she would have at once what she could not retain if the estate was solvent. The statute, no doubt, does allow a person making a claim in respect of an annuity when in arrear to prove for the estimated amount against the estate. That does not make that person a creditor for such sum. As was pointed out in *In re Hargreaves* (1), so long as the annuity is paid and there are no arrears, an annuitant has no right to take proceedings for administration, though if an administration decree has been obtained by some one else as creditor he is allowed to prove. If the annuity is in arrear, it is another matter. The administratrix will be allowed to prove for the value of her future annuity in competition with the other creditors.

Solicitors for plaintiff: *Macarthur & Co.*
Solicitor for defendant: *H. Dolling Smith.*

(1) 44 Ch. D. 236.

D. P.

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STIRLING J.
1895
Oct. 30.

In re DARLING.
FARQUHAR *v.* DARLING.

[1895 D. 589.]

Will—Construction—Charitable Gift—Gift "to the Poor and the Service of God."

A gift by will "to the poor and the service of God" is a good charitable gift.

Powerscourt v. *Powerscourt* (1 Molloy, 616) is an authority to this effect.

THE will, dated September 4, 1888, of Elizabeth Caroline Darling, commenced as follows: "I desire that at my death all of which I may die possessed, with the exception of the few legacies and gifts I may hereafter make, shall go to the poor and the service of God."

The testatrix then gave directions as to the sale and disposal of certain chattels, property of value in her house, and shares, stocks, and money at her bankers, giving thereout a number of pecuniary legacies to various charitable institutions; and she concluded her will (so far as material) as follows: "And the money, if any, left to be given at the discretion of my executors to these or other similar charities that may at my death be most deserving."

This was an originating summons taken out by the executors of the will asking (inter alia) for liberty to distribute the ultimate residue in a particular way, and the only question raised thereon which calls for a report was whether the direction at the commencement of the will constituted a good charitable gift.

Beale, Q.C., and *Dundas Gardiner*, for the executors.

Hastings, Q.C., and *Onslow*, for the next of kin. The residuary gift at the commencement of the will is bad, and the residue goes to the next of kin. A gift for the benefit of the poor generally, or to the poor of a particular place, is, no doubt, a good charitable gift; but a gift "to the service of God" is bad, as being too vague, uncertain, and indefinite; for it may

embrace almost every act which any human being can properly do. And when a good charitable gift and a bad charitable gift are mixed up together, both of them fail: *Budget* v. *Hulford* (1); *In re White's Trusts* (2); *Townsend* v. *Carus* (3); *Williams* v. *Kershaw* (4), note to *Miller* v. *Rowan*. (5)

Ingle Joyce, for the Attorney-General. A gift to "the service of God" is equivalent to a gift for general religious purposes, for the word "service" must be taken to be used in a religious sense. And a gift for general religious purposes is a good charitable gift: Tudor's Charitable Trusts, 3rd ed. p. 10. In *Powerscourt* v. *Powerscourt* (6) it was held that a direction to lay out money "in the service of my Lord and Master" constituted a good charitable gift; and that decision is directly in point in the present case. *Felan* v. *Russell* (7) and *In re Sutton* (8) are also authorities in favour of the validity of this gift.

[STIRLING J. I do not think that *In re Sutton* (8) is applicable here, because in that case there was only one class of objects.]

This can be treated as a gift for "religious services for the advantage of the poor." But if the dedication to charitable purposes at the commencement of the will is bad, there is a good charitable gift at the end of the will in the words "and the money, if any, left to be given at the discretion of my executors to these or other similar charities that may at my death be most deserving."

Dibdin, for one of the charities interested.

Hastings, *Q.C.*, in reply.

STIRLING J. In this case the testatrix commences her will thus: "I desire that at my death all of which I may die possessed, with the exception of the few legacies and gifts I may hereafter make, shall go to the poor and the service of God." The question which has been argued before me is

(1) W. N. (1873) 175.
(2) 33 Ch. D. 449.
(3) 3 Hare, 257.
(4) 5 Cl. & F. 111.
(5) 5 Cl. & F. 99.
(6) 1 Molloy, 616.
(7) 4 Ir. Eq. Rep. 701.
(8) 28 Ch. D. 464.

STIRLING J. whether or not that is a good charitable gift; and it is said that it is not good because it includes under it objects which are not recognised by the law as charitable. There is no question that a gift for the benefit of the poor is a good charitable gift; but the argument is that though a gift for the benefit of the poor is a good charitable gift, a gift for the service of God is not a good charitable gift. It is said that the service of God includes much that is not religious. In a sense that is true. There is an ancient document which we sometimes hear recited (1) in which the congregation are invited to beg a blessing upon all schools and seminaries of sound learning and religious education, so that "there may never be wanting a due supply of persons fitly qualified to serve God both in Church and State." The distinction is drawn, therefore, between Church and State, but the persons referred to are alike spoken of as serving God therein. In a certain sense, therefore, acts which are not religious are said to be in the service of God. But I have to construe this will according to the ordinary meaning of the language as used by English testators; and I think that when "the service of God" is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended—service similar to such service as is referred to when in the document which I have mentioned service in the Church is spoken of. Therefore, if the matter were unaffected by any authority, I should come to the conclusion that gifts to the poor and the service of God are gifts to the poor and to religious purposes, and are good accordingly. But the point is not without authority. The same question, or a very similar one, came before Manners L.C., in Ireland, in *Powerscourt* v. *Powerscourt*. (2) There there was a devise to trustees to lay out at their discretion 2000*l*. per annum till the testator's son came of age "in the service of my Lord and Master and I trust

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(1) The form of the bidding prayer now in use in the Church of England was fixed by Canon 55 of 1603: an English form had been prescribed by King Henry VIII., but the substance, or some of it, is much older. See Burnet, Hist. Ref. part 2, bk. 1 (ii. 47, ed. Nares); Ivo, Decretum, pars ii., c. 120, purporting to be a canon of a council held at Orleans in the sixth century: (in Migne's Patrologia, tom. 161, p. 193).—F. P.

(2) 1 Molloy, 616, 618.

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Redeemer" ; and the judgment of the Lord Chanceller is this. After referring to certain cases under the Statute of Elizabeth, he says : "These cases prove that pious uses are a branch of charity, and as such are recognised and carried into effect in this Court. Now on reading the passage in question in this will, can any one doubt that it means to bequeath 2000*l.* a year to pious uses? It has been argued that the service of God includes our duty to our neighbour as well as that to God, that it involves that great uncertainty and vagueness which rendered the bequest void in *Morice* v. *Bishop of Durham.* (1) I think otherwise, and considering the words of Sir W. Grant in that case, namely, that no bequest has been established in England without either the word charity or some specific object being pointed out, I am of opinion that a bequest to pious uses sufficiently designate a specific object, and that this cannot be distinguished from a bequest to pious uses."

It has not been disputed before me that a bequest for religious purposes is a good charitable bequest; and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes.

Solicitors: *H. W. Lyall; Bell, Stewards, May & How; Solicitor to Treasury; Bridges, Sawtell & Co.*

(1) 10 Ves. 522.

W. W. K.

STIRLING J. 1895 July 3, 4; Oct. 31.

In re MASON'S ORPHANAGE AND LONDON AND NORTH WESTERN RAILWAY COMPANY.

Charity Lands—Charity founded by Deed—Sale by Trustees of Lands under Power in Deed—Consent of Charity Commissioners—"Scheme legally established"—Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

A deed founding a charity, and duly enrolled under 9 Geo. 2, c. 36, is not "a scheme legally established" within s. 29 of the Charitable Trusts Amendment Act, 1855; and the trustees in whom the lands of the charity are vested cannot sell such lands under a power of sale contained in the deed, otherwise than with the authority of Parliament, or of the Court, or with the approval of the Charity Commissioners.

Semble. Such trustees could sell under the powers conferred by the Lands Clauses Acts, and subject to the provisions therein contained in cases of sales by persons under disability.

By a deed of foundation dated July 29, 1868, and duly enrolled and perfected in accordance with the provisions of the Act 9 Geo. 2, c. 36, and the subsequent Acts amending the same, Sir Josiah Mason conveyed certain freehold hereditaments to trustees for charitable purposes. By clause 60 of the deed the trustees, or any five of them, were empowered by any deed or deeds, to be executed as therein mentioned, to dispose of and convey either by way of absolute sale, or in exchange for other hereditaments in England or Wales, all or any part of the hereditaments thereby assured, with an immaterial exception. Acting under this power, the trustees for the time being entered into a contract for the sale to the London and North Western Railway Company of part of the hereditaments so conveyed to them; but the purchasers raised the objection that s. 29 of the Charitable Trusts Amendment Act, 1855, precluded the trustees from exercising the power of sale without the consent of the Charity Commissioners; and insisted either that such consent should be obtained, or that the purchase-money should be paid into Court in accordance with s. 69 of the Lands Clauses Consolidation Act, 1845. The vendors answered that they were not bound to comply with either alternative; and

the question thus raised came before the Court upon a summons taken out by the purchasers under the Vendor and Purchaser Act, 1874. Sect. 29 of the Charitable Trusts Amendment Act, 1855, provides as follows:—

Sect. 29: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

A. Underhill, for the summons. The words "scheme legally established" used in s. 29 of the Act of 1855 are not applicable to a trust constituted inter vivos or by agreement or deed between the parties. Where used in connection with a charity, the word "scheme" always means a scheme framed with the approval of the Court or the Charity Commissioners: 2 Seton on Decrees, 5th ed. pp. 1083, 1084, 1085. That it has this technical meaning is shewn by the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 8, 36, 42, 54–60. If the question had arisen under that Act the word "scheme" could not have been construed as including an instrument founding a charity, and it must have the same meaning in the Act of 1855 as in the Act of 1853. The Act of 1855, however, makes the matter still clearer by using the words "legally established," and it is explicitly enacted that it shall not be lawful for the trustees of any charity to make any sale otherwise than is therein mentioned. So that, as there is here no "scheme legally established," the trustees cannot sell without the express authority of Parliament or the approval of the commissioners.

Hastings, Q.C., and *Ingle Joyce*, for the orphanage. Before the passing of the Charitable Trusts Acts the property of a charity could be alienated, even in the absence of an express

STIRLING J. power; but the persons who took from the trustees had to shew that the alienation was beneficial to the charity and justified under the circumstances: Tudor's Charitable Trusts, 3rd ed. p. 251; *Attorney-General* v. *Warren* (1); *Attorney-General* v. *South Sea Co.* (2); *In re Clergy Orphan Corporation.* (3)

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It was not the intention of the Legislature in the Acts of 1853 and 1855 to deprive trustees of charities of the powers of sale which they formerly possessed: *Governors of St. Thomas' Hospital* v. *Charing Cross Ry. Co.* (4)

[Stirling J. The difficulty as to trustees of charities selling could be got over by obtaining the authorization of the Charity Commissioners under s. 24 of the Act of 1853; but s. 29 of the Act of 1855 must have been enacted for some further reason.]

That section was intended to apply to cases in which there was no express power of sale. That is not so here. The instrument regulating the charity is a "scheme legally established" within the meaning of s. 29. Sects. 54–60 deal with "new schemes," implying that deeds under which charities were formerly regulated also came under the description of schemes. The Court will be slow to give the word "scheme" a purely technical meaning: *Massy* v. *Rowen.* (5) The definition of the word given in Webster's Dictionary is—"a combination of things connected and adjusted by design; a system." The wishes of the founder of a charity as to its regulation expressed in appropriate language is a scheme legally established. It certainly is a scheme, and it is rendered legal by the necessary formality of enrolment as a deed. The Court will not interfere with a properly constituted scheme: *In re Campden Charities.* (6) Sect. 29 of the Act of 1855 must be read with ss. 24 and 26 of the Act of 1853, under which sales authorized by the commissioners are to have "the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity." The validity of a sale under an express power is, therefore, clearly recognised. It is also recognised in

(1) 2 Swans. 291, 302.
(2) 4 Beav. 453.
(3) [1894] 3 Ch. 145, 154.
(4) 1 J. & H. 400, 406.
(5) L. R. 4 H. L. 288, 300.
(6) 18 Ch. D. 310.

s. 12 of the Charitable Trusts Act, 1869: 1 Key and Elphinstone's Conveyancing, 4th ed. p. 625; *Corporation of the Sons of the Clergy and Skinner.* (1)

[Stirling J. The word "scheme" seems to be used in a technical sense in s. 29 of the Act of 1855.]

The regulations of a charitable trust embodied in a deed form a scheme just as much as if they were put into a formal scheme settled by the Court. The section does not speak of a scheme established by the Court.

Underhill, in reply. The word "scheme" taken in connection with the expression "legally established" cannot include a trust deed. The expression "scheme legally established," even in a popular sense, is not equivalent to "trust validly declared." According to the Imperial Dictionary, the meaning of "establish" is "to institute and ratify; to enact or decree authoritatively and for permanence; to ordain."

The trustees could, no doubt, sell under the provisions of the Lands Clauses Act, but there would be a question whether they could give a valid receipt; and it is not desired by either party that the money should be paid into Court.

Cur. adv. vult.

1895. Oct. 31. Stirling J. (after referring to the facts of the case). In the present case the contention on the part of the trustees of the charity is that the deed of 1868, under which they are acting, constitutes "a scheme legally established" within the meaning of the Act, and consequently that the sanction of the Charity Commissioners is not required.

Usually, when a scheme is spoken of in connection with a charity, what is meant is, not the instrument of foundation, but a document sanctioned by some properly constituted authority containing directions for the administration of the charity. Previously to the passing of the Act of 1853, such schemes were made by the Court of Chancery only. They were made mainly in three classes of cases: (1.) Where the directions contained in the instrument of foundation were ambiguous, imperfect, or otherwise insufficient; (2.) Where the directions, though

(1) [1893] 1 Ch. 178.

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originally precise and complete, had become under altered circumstances unsuitable to carry out the general intention of the founder; and (3.) Where a scheme sanctioned by the Court itself had in like manner become unsuitable for that purpose. The Charitable Trusts Act of 1853 authorized the making of schemes by other authorities than the Court of Chancery, as by bankruptcy and county courts: see ss. 32 and 36 of the Act of 1853.

In the Act of 1853 the word "scheme" occurs in ss. 8, 36, 42, 54–60 (both inclusive); and in the Act of 1855 it occurs in s. 39; and in all those places it is used to designate such an instrument as I have just been describing. Primâ facie, therefore, it may be expected to bear the same meaning in s. 29.

Against this two arguments are used. First, it is said that ss. 54–60 speak of *new schemes*, implying that the instrument which for the time being governed the administration of the charity was an *old scheme*; that such instrument might be that of foundation; and that consequently it is to be inferred that such instrument was regarded by the framers of the Act as a scheme. To my mind, the inference thus sought to be drawn appears to be far from conclusive.

Secondly, reliance is placed on the language of s. 26 of the Act of 1853, which provides that leases, sales, and other transactions sanctioned by the commissioners are to have the like effect and validity as if they had been authorized or directed by the express terms of the trusts affecting the charity; and it is said that these words imply that acts by the trustees authorized by the express terms of the trusts are valid. No doubt this was so in 1853, and would have continued to be so in the absence of any further enactment; but it seems to me that there would have been no inconsistency if the same Act of 1853 had by a subsequent section prescribed that leases, sales, or other transactions expressly authorized or directed should not be valid, unless approved by the commissioners, and a fortiori there seems to be no inconsistency between the enactment in s. 29 of the Act of 1855 and that in s. 26 of the Act of 1853. Moreover, this remark may be made: if the intention was that every sale, mortgage, or lease authorized or directed by the

express terms of the trust should be valid without the approval of the Charity Commissioners, why was not that language used in s. 29 of the Act of 1855 as it is in s. 26 of the Act of 1853?

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Again, the use of the words "legally established" in connection with the word "scheme" seems to point to the intervention of some duly constituted legal authority; and in this sense the word "establishment" is used in s. 42 of the Act of 1853.

As a mere matter of verbal construction, therefore, I should come to the conclusion that the words "scheme legally established" did not include the instrument by which the charity was founded; but I further think that it would be unsatisfactory to dispose of the case without considering what object was intended by the Legislature to be attained by the enactment contained in s. 29. That section prohibits three classes of transactions—(1.) sales, (2.) mortgages or charges, and (3.) certain kinds of leases of charity estates; and it is desirable to see how the law stood with respect to such transactions prior to the passing of the first Act, namely, that of 1853.

A sale, lease, or mortgage made in accordance with an express power was good. On this I may refer to the judgment of Lord Cranworth (then Vice-Chancellor) in *Attorney-General* v. *Hardy* (1), where it was held that a trustee of a Wesleyan chapel under a deed which contained a power of raising money by mortgage might become himself a mortgagee, and if he did so become, might exercise all the rights of a mortgagee, although in opposition to the trusts. Even when no express power of sale existed, a sale might be made of the charity estate, provided it were in accordance with a provident administration of the estate for the benefit of the charity; but the purchaser took subject to the obligation of shewing that the sale was beneficial to the charity and justified by the circumstances: *Attorney-General* v. *Warren* (2); *In re Clergy Orphan Corporation.* (3) The Court, although it had power to sanction the alienation of charity lands, exercised this power with great caution: see *Attorney-General* v. *Mayor of Newark.* (4) As

(1) 1 Sim. (N.S.) 338.
(2) 2 Swans. 291, 302.
(3) [1894] 3 Ch. 145, 154.
(4) 1 Hare, 395.

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regards leases, it was laid down that where power was given to trustees of a charity to make leases generally they might (both at law and in equity) either take fines or reserve rents as was most beneficial to the charity: *Attorney-General* v. *Mayor of Stamford*. (1) Leases might be made for long terms provided it were for the benefit of the charity: see *Attorney-General* v. *South Sea Co.* (2); but here again the onus of proving that the transaction was beneficial lay on the lessee: *Attorney-General* v. *Pilgrim* (3), and it was laid down that primâ facie the terms of a husbandry lease ought not to exceed twenty-one years, nor that of a building lease ninety-nine: *Attorney-General* v. *Owen* (4); *Attorney-General* v. *Backhouse*. (5) Similar principles appear to have applied to leases in reversion: *Attorney-General* v. *Kerr* (6), where one of two such leases was upheld and the other set aside.

As regards leases for lives, however, they were held to be good, at all events, if they were in accordance with the custom of the country or a long-continued practice: *Attorney-General* v. *Cross* (7); *Attorney-General* v. *Crook* (8); and in the former case so great a judge as Sir W. Grant M.R. said that he was not aware of any principle or authority on which it could be held that such a lease was, on the face of it, a breach of trust.

This statement of the law appears to me to disclose two blots at least in charity administration. In the first place, it was obviously difficult in many cases for a trustee, not acting under the direction of the Court, to satisfy himself that the transaction in which he was engaging might not be afterwards held to be a breach of trust. Secondly, many transactions held by the Courts to be within the powers of trustees were, to say the least, of very doubtful expediency in the interest of the public.

By ss. 21 and 24 of the Act of 1853 the Legislature authorized the Charity Commissioners to sanction leases, mortgages, sales

(1) 2 Swans. 591, 592.
(2) 4 Beav. 453.
(3) 2 H. & T. 186.
(4) 10 Ves. 555.
(5) 17 Ves. 283, 291.
(6) 2 Beav. 420.
(7) 3 Mer. 524.
(8) 1 Keen, 121.

and exchanges of charity lands, and thus enabled the trustees to obtain protection in a cheap mode and without putting the charity estate and themselves to the expense of proceedings in Chancery. Thus, the first of the two blots was removed; and the second was, I think, intended to be wiped out by s. 29 of the Act of 1855.

I think the view of the Legislature was that alienation of charity estates by way of sale or mortgage, or by lease in reversion or for lives or longer terms, or in consideration of fines, gave rise to abuses, which the law, as it stood prior to 1855, did not adequately prevent, and that such transactions ought not to take place except by the direct authority of Parliament, or with the sanction direct or indirect of the Court or the Charity Commissioners, both being authorities familiar with charity administration, and likely to be vigilant in guarding against its abuses. But founders of charities and their legal advisers are not necessarily cognisant of what has been done in past times, and may unwittingly introduce into the instruments of foundation clauses which the experience of the Courts or Charity Commissioners would lead them to regard as highly objectionable. I do not suggest for a moment that the present vendors have done or intend to do anything which could possibly be treated as an abuse of these powers; but if their contention be well founded, it follows that the founder of a charity might by introducing appropriate clauses into the foundation deed effectually authorize his trustee to grant leases in reversion, or for lives, or long terms, or in consideration of fines, without the sanction of the Charity Commissioners. I do not think that this was intended by the Legislature.

Sect. 29 of the Act of 1855 prohibits (amongst other things) sales except under certain circumstances. It is for those who claim that their case falls within the one of the excepted cases to make it out; and upon a fair construction of the enactment I think that the present vendors fail to do so. In my judgment, therefore, the objection raised by the purchaser is well founded, and there must be a declaration accordingly.

I declare that the vendors cannot make a good title to sell or convey the property without obtaining the consent of the

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Charity Commissioners, unless they act under the powers conferred by the Lands Clauses Acts, and subject to the provisions therein contained in cases of sales by persons under disability.

Solicitors: *C. H. Mason; Burton, Yeates, & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham.*

W. W. K.

STIRLING J. 1895 *July* 23; *Nov.* 5.

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[1894 C. 3146.]

Copyholds—Married Woman Tenant on the Rolls—Declaration of Trust by Deed acknowledged—Effect of—"Disposition"—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.

A declaration of trust of copyholds by a married woman, tenant on the rolls of the manor, by a deed acknowledged under the Fines and Recoveries Act is a "disposition" within the meaning of s. 77 of the Act, and will effectually bind the copyholds as against her customary heir. Such a case is not within the proviso to the section.

TRIAL OF ACTION.

By a post-nuptial settlement dated January 2, 1878, and made between James Carter and Susannah Carter, his wife, of the one part, and the defendants J. L. Sayers and E. Sayers of the other part, after recitals that certain copyhold hereditaments situate in West Tarring, in the county of Sussex, had been devised to the said Susannah Carter, and that she had been duly admitted tenant thereof, and that certain freehold hereditaments had been conveyed to her, Susannah Carter and her husband conveyed to J. L. Sayers and E. Sayers the said freehold hereditaments upon the trusts thereinafter declared. And James Carter covenanted with the defendants J. L. Sayers and E. Sayers that he would, when required so to do, at the cost of the trust estate concur with Susannah Carter, and all other necessary parties, in surrendering into the hands of the lord of the manor of Tarring a certain piece of land within the manor to which Susannah Carter had been admitted as devisee under a certain will, to the use of the defendants, their heirs

and assigns, according to the custom of the manor, to the intent that they, their heirs or assigns, should, when admitted thereto hold the same upon the trusts and with and subject to the powers and provisions thereinafter declared. And it was thereby agreed and declared that in the meantime, and until the said premises should be surrendered in pursuance of the covenant thereinbefore contained, Susannah Carter and her heirs should stand seised of and hold the said premises upon the aforesaid trusts with and subject to the aforesaid powers and provisions, or as near thereto as circumstances would admit. The trusts were for such person or persons and for such purposes as Susannah Carter should whether covert or sole by deed or will appoint, and in default of or subject to such appointment, to pay the rents, profits, and income of the trust premises to Susannah Carter during her life for her separate use, and after her decease to James Carter, if he should survive her, during his life; and after the decease of the survivor of them to sell the said hereditaments and hold the residue of the moneys to arise from such sale in trust for such of the children of James and Susannah Carter as should be living at the decease of the survivor of them, and if more than one in equal shares.

The settlement was executed by all parties, and duly acknowledged by Susannah Carter in accordance with the provisions of the Fines and Recoveries Act. Susannah Carter died on November 20, 1884, without having exercised her power of appointment under the settlement, and James Carter died on October 24, 1892. There were five children of James and Susannah Carter who survived James Carter. They were all daughters, and were plaintiffs in this action. Susannah Carter had only one son. He predeceased her, and the defendant Alfred James Carter was his only son. The copyhold hereditaments were never surrendered by Susannah Carter, and she continued tenant on the court rolls until her death. The defendant Alfred James Carter, who was an infant of seventeen years of age, was on May 8, 1894, admitted tenant, by his guardian, as her customary heir.

The plaintiffs claimed (1.) to have the trusts of the indenture

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of settlement of January 2, 1878, carried into execution, and the rights and interests of all persons thereunder ascertained; and (2.) a declaration that the defendant Alfred James Carter was a trustee of the said copyhold hereditaments for the persons interested under the said indenture of settlement.

The steward of the manor gave evidence to the effect that there was no custom of the manor which required the lord of the manor to take notice of trusts; and consequently the deed of 1878 could not be entered on the court rolls.

Robertson-Macdonald, for the plaintiffs. The infant customary heir is bound by the trusts of the copyholds declared by Mrs. Carter. If she had been a feme sole she could have made a valid declaration of trust of the copyholds: *Steele* v. *Waller*. (1)

Sect. 77 of the Fines and Recoveries Act enables a married woman to dispose of copyholds by deed acknowledged. That is a general enabling clause, and I submit that the declaration of trust by Mrs. Carter operates as a "disposition" of the copyholds within that section: *Crofts* v. *Middleton* (2); *Pride* v. *Bubb*. (3) A trust for the sale of the copyholds could not have been created by surrender; consequently the proviso to the section has no application.

W. D. Rawlins, for the infant defendant. The object of the settlement might have been effected by a surrender to the trustees, an admittance of them by the lord, and a declaration, either upon the rolls of the manor or not, declaring the trust. Before the passing of the Fines and Recoveries Act a married woman could not have created a trust of copyholds. That Act by s. 77 no doubt enabled a married woman with her husband's concurrence to dispose of any estate which she might have in lands of any tenure. But a declaration of trust is not a disposition within the meaning of that section. Before the Act a married woman could dispose of her legal estate in copyholds by surrender with the concurrence of her husband. It was not found necessary, therefore, by the framers of the Act to provide

(1) 28 Beav. 466.

(2) 2 K. & J. 194; 8 D. M. & G. 192, 212.

(3) L. R. 7 Ch. 64.

for that case. The disposition by married women of equitable estates in copyholds is provided for by s. 90. A married woman's power of alienation is confined to what is given her by the statute, and the power thereby given to her is conditional on its execution in the manner which the statute prescribes: *Cahill* v. *Cahill*. (1) The case which comes nearest to the present case is *Green* v. *Paterson*. (2) I adopt the argument used in support of the appeal in that case, namely, that although it has been held that a married woman may dispose of freehold estates by deed acknowledged under the Fines and Recoveries Act, yet that Act does not empower her to dispose of copyholds. Fry L.J. in that case intimated that in his opinion a mere declaration of trust was not a "disposition" within s. 40 of the Act.

I contend, further, that the case comes within the proviso to s. 77.

[He also referred to Watkins on Copyholds, 4th ed. vol. i. p. 272.]

Robertson-Macdonald, in reply. The proviso was only intended to carry out what has always been the object of the Legislature, namely, to prevent interference with the lord's rights, and his interests are not affected at all by a declaration of trust. In *Green* v. *Paterson* (2) there was no decision that a declaration of trust was not a "disposition" within s. 77. It was only a decision that a declaration of trust was not a disposition of lands within ss. 15 and 40 of the Act sufficient to bar an estate tail.

[He also referred to *Pullen* v. *Lord Middleton* (3), and Elton on Copyholds, 2nd ed. 92.]

B. B. Swan, for the trustees.

Cur. adv. vult.

1895. Nov. 5. STIRLING J. (after stating the facts). The deed of 1878 was purely voluntary. An effectual disposition of property may be made without consideration in two ways, as is well shewn by Sir G. Jessel M.R. in *Richards* v. *Delbridge*. (4)

(1) 8 App. Cas. 420, 428.
(2) 32 Ch. D. 95.
(3) 9 Mod. 483.
(4) L. R. 18 Eq. 11, 14.

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He states it thus: "A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person."

To my mind it is plain that the draftsman of this deed was aware of the law, and intended, so far as related to the copyholds, to avail himself of the second mode of disposition referred to by the Master of the Rolls in that case. The question is, has he effectively done so?

Mrs. Carter never divested herself of the legal ownership of the property; but she did by the deed of 1878 declare herself a trustee of it; and if she had been at that date a feme sole, I think that the trusts thereby declared would have been binding on her heir. She was, however, under coverture; and the question which I have to decide reduces itself to this, whether a married woman, tenant on the rolls of copyholds, can by deed acknowledged under the Fines and Recoveries Act effectually declare herself a trustee of those copyholds. The answer depends on s. 77 of the Act. It is thereby provided: "After the 31st day of December, 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act,"—it is material to bear in mind that exception for reasons which I will state presently—"by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested

in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." I stop there for the moment, and will consider the proviso to the section later. The requirements of the Act to a disposition by a married woman are that it should be by deed concurred in by the husband, and acknowledged by the wife in the manner required by the Act. With all these requirements the deed of 1878 complies. The first question which arises on this enactment is whether a declaration of trust is a "disposition." The words "dispose" and "disposition" in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning; and where not limited by the context those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created.

A declaration of trust on the part of a feme sole, whereby she effectually parts with the entire equitable interest in property of which she remains legal owner, certainly appears to me to be a disposition in equity of that property.

That is borne out by the decision of Lord Hatherley L.C. in *Pride* v. *Bubb.* (1) There the question arose on a separation deed whether the effect of it was to impose upon real estate, of which a married woman was the owner, the incident of its being for her separate use. There was a recital in the deed from which it appeared that such was the intention, but there was nowhere any express conveyance of the legal estate by the married woman. Lord Hatherley said: "Now the object of this deed is clearly to place this lady, with reference to all her real property whatsoever and whensoever acquired, in exactly the same position as if she had no husband at all; in other words, to give her the whole of the property to her

(1) L. R. 7 Ch. 64, 69.

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separate use. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord Westbury in *Taylor* v. *Meads* (1), that she would hold as a feme sole and be able to make a will, the husband being placed out of the way. And I apprehend that by a deed duly executed, in which her husband concurred, the whole of her property might be placed in that position without any actual conveyance or assignment, and simply by the agreement of the husband, who is the only person concerned in the matter. In this deed it is recited that for valuable consideration the husband had agreed with his wife to abandon all authority over her property, and to give her full power of disposition over it as if she were sole. Then he covenants, and she makes a declaration to the same effect; and as both present and future property was to be included, it is impossible to hold that this reversion expectant on her life estate is not to be considered as within the meaning of the deed. I am quite satisfied that the observations in *Crofts* v. *Middleton* (2), with reference to the statute which enables the husband and wife to deal with her estate as they think fit, were intended to displace the notions which I had expressed as to the effect of a mere contract."

It was said, however, that the contrary was decided in *Green* v. *Paterson* (3), a decision binding upon me. That case, so far as it is material to the present, related to copyholds of which a married woman was tenant in tail; and tenancies in tail are expressly excluded from the operation of s. 77 of the Fines and Recoveries Act, and depend on the prior ss. 15 and 40. It is quite true that s. 15, by which a tenant in tail was empowered to dispose of the lands entailed, uses the same word, "dispose," as occurs in s. 77; but s. 40 limits the mode of disposition by enacting that every disposition of lands under the Act by a tenant in tail thereof should be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute; and no disposition by a tenant in

(1) 34 L. J. (Ch.) 203. (2) 8 D. M. & G. 192, 212.
(3) 32 Ch. D. 95.

tail resting only in contract should be of any force at law or in equity under the Act. The effect of that is that the mode of disposition to bar an estate tail is limited to such an instrument inter vivos as would be effectual to pass a legal estate in fee simple. A mere declaration of trust, of course, could not pass a legal estate; and, consequently, I entirely agree, if I may be allowed to say so, in the decision of the Court of Appeal in *Green* v. *Paterson* (1), that a mere declaration of trust could not bar an estate tail. The language of Fry L.J. (2) might, no doubt, admit of a wider meaning, and that is what is relied upon. He says: "In the first place, the statute requires that the instrument to bar the estate tail shall be a disposition, and I find in this case nothing like a disposition. It is a mere declaration of trust by the lady." Those words, taken literally, would seem to indicate an opinion that a mere declaration of trust was not a sufficient disposition within the Fines and Recoveries Act; but I think that they ought to be read as applying only to the point then actually calling for decision, and not as intended to affect the construction of s. 77, which was not under consideration by the Court, and all the more so as I observe that *Pride* v. *Bubb* (3) was not cited to the Court in the argument.

In s. 77 I find nothing which requires the disposition to be made by such an assurance as is required by s. 40.

It is next contended that the transaction falls within the concluding proviso of s. 77. That proviso is as follows: "Provided always, that this Act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel." In my opinion, the object intended to be effected by the deed of 1878 was that Mrs. Carter should declare herself a trustee of the legal estate in the copyholds

(1) 32 Ch. D. 95. (2) 32 Ch. D. 108.
(3) L. R. 7 Ch. 64.

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then vested in her, or, in other words, to effect a disposition of the equitable interest without disturbing the legal title. I fail to see how this object could be effected by a surrender of that estate into the hands of the lord of the manor; for the effect of such a surrender would be to alter the legal title; consequently the proviso does not seem to me to touch the present case.

In my opinion, therefore, the heir is bound by the trusts of the settlement, and judgment must be given in favour of the plaintiffs.

I declare that the heir is bound by the trusts of the deed, and that he is a trustee of the legal estate vested in him for the purposes of the deed; and I direct a proper assurance to be executed with liberty to apply in chambers for a vesting order.

Solicitors: *H. Sowton, for J. C. Buckwell, Brighton; Henshall Fereday; H. E. Griffith, for Holmes & Bennett, Worthing.*

G. A. S.

Applied. *Re* HARARI'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 430.

KEKEWICH J.
1895
Nov. 9.

In re SMITH.
SMITH *v.* THOMPSON.

[1895 S. 1193.]

Trustee—Breach of Trust—Investment—Power to Invest in such Securities as Trustee "shall think fit"—Commission or Bribe—Liability of Trustee to refund.

A testator gave his residuary estate to trustees upon trust to invest "in such stocks, funds, and securities as they should think fit." The trustees invested a portion of the trust estate in 3000*l.* debentures, constituting a floating security on the undertaking and assets of a limited company. One of the trustees received a commission or bribe of 300*l.* for making this investment. The other trustee, since deceased, who was tenant for life of two-thirds of the residue, made the investment in the bonâ fide belief that it was a good one, and with the desire of increasing his income. In an action by beneficiaries seeking to make the surviving trustee and the estate of the deceased trustee jointly and severally liable to make good any loss to the trust estate occasioned by the investment:—

Held, that the words "shall think fit" must be read as meaning "shall honestly think fit"; that in the absence of evidence that the deceased trustee did not act honestly in making the investment his estate could not be made liable; but that the other trustee, having received a bribe, could not have honestly thought fit to make the investment, and was therefore liable to make good the loss:

Held further, that, in addition to making good the loss, the surviving trustee was liable to refund the 300*l.* as being money received by him, at the time when the investment was made, on behalf of the trust estate, and that his position was not altered by the fact that he was subsequently held liable to make good the loss occasioned by the investment.

THOMAS SMITH, by his will dated October 10, 1890, appointed T. J. Barratt and Arthur Carpenter trustees and executors, and, after bequeathing certain legacies and annuities and giving directions concerning the carrying on of his business, as to the rest residue and remainder of his real and personal estate, he directed his said executors and trustees or trustee for the time being in their or his absolute discretion to sell and convert the same into money, and to invest the net proceeds of such sale and conversion, after paying thereout his funeral and testamentary expenses and debts and legacies and annuities thereinbefore

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given, "upon such stocks, funds, and securities as they or he shall think fit," and to stand possessed of two-thirds of such residuary estate, or the stocks, funds, and securities of which the same might consist, upon certain trusts in favour of the testator's son Clement Smith during his life, and his children after his decease, and of the other third on certain trusts in favour of Mary Fairhead Smith during her life, and her children after her decease.

By a codicil to his will the testator revoked the appointment of T. J. Barratt as executor and trustee, and appointed his son Clement Smith executor and trustee in the place of Barratt.

The testator died on January 21, 1892; and his will and codicil were on February 19, 1892, duly proved by Arthur Carpenter and Clement Smith.

Arthur Carpenter and Clement Smith sold and converted portions of the real and personal estate of the testator, and invested the proceeds in (1.) certain mortgage securities for 3,770*l.*; (2.) 15,000*l.* colonial government inscribed stocks which were placed in the names of both trustees; and (3.) 3000*l.* debentures in a company called the "New Travellers' Club, Limited." On the occasion of the last-mentioned investment Arthur Carpenter received from the company a bonus or commission of 300*l.* for procuring the application by the trustees for the debentures.

Clement Smith died in 1894, having by his will devised and bequeathed his real and personal estate to his two children, who were infants, and appointed Arthur Carpenter and Catherine M. Jackson executor and executrix of his will.

Mary Fairhead Smith died in the lifetime of the testator Thomas Smith, leaving an only child, who was an infant.

In April, 1895, B. T. Thompson was appointed a trustee of the will and codicil of Thomas Smith in the place of Clement Smith, deceased.

This action was brought by the two infant children of Clement Smith and the infant child of Mary Fairhead Smith, as plaintiffs, against B. T. Thompson, Arthur Carpenter, and Catherine M. Jackson, as defendants, claiming (inter alia) that the defendant Arthur Carpenter and the estate of Clement Smith might

be held jointly and severally liable for any loss which might accrue to the trust estate by reason of the investments in colonial securities and debentures with interest, and that Carpenter might be ordered to pay the sum of 300*l.* with interest.

On the action coming on for hearing, the claim for relief in respect of the colonial securities was not persevered in.

As regards the 3000*l.* debentures in the New Travellers' Club, Limited, it appeared that the company was a limited company, formed under the Companies Act, 1862, and that the debentures, which were payable to bearer, were in the ordinary form of a floating security on the assets and undertaking of the company.

The 300*l.* commission was received by Carpenter from a director of the company, who was a friend of his. At the time when the investment was made, Clement Smith was wholly unaware that any commission had been received by Carpenter, and he concurred with Carpenter in making the investment by his advice, and in the belief that the investment was a good security for the money advanced. The debentures carried interest at 5 per cent., which had been paid; and there was no doubt that in consenting to the investment Clement Smith was actuated by a desire to increase his income.

It was stated that the available assets of the company consisted mainly of premises let at a rack-rent, and of the furniture and other effects of the club.

Renshaw, Q.C., and *William Freeman*, for the plaintiffs. There are no authorities which define the measure of liability of trustees who are empowered to invest in such securities as they shall think fit. The two cases which are nearest in point are *Lewis* v. *Nobbs* (1) and *In re Brown.* (2) In *Lewis* v. *Nobbs* (1), under a power to vary trust funds and invest in any other funds or securities whatsoever, an investment in Russian railway and Egyptian bonds was held to be authorized; and in *In re Brown* (2) trustees having an uncontrolled discretion were allowed sums invested in the purchase of bonds of

(1) 8 Ch. D. 591. (2) 29 Ch. D. 889.

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a foreign government, bonds of a colonial railway company, and shares of a bank, on which there was a liability, but which were subsequently sold at a profit. In view of these authorities, the plaintiffs do not press any objection to the investment in colonial stocks; but the investment in the debentures of the limited company, even if no bribe had been taken, was clearly improper. If the debentures are to be regarded as a mortgage security, there ought to have been a valuation, which there was not. If they were not a security, it is submitted that they do not come within the terms of the power. Moreover, the debentures were payable to bearer, and it is improper for trustees to invest on debentures of that description. But the fact that Carpenter took a bribe fixes him with liability; and Clement Smith, his co-trustee, who concurred with him in making the investment, must equally be liable.

Marten, Q.C., and *Dundas Gardiner*, for the defendant Catherine Mary Jackson. The estate of Clement Smith is not liable. There is no evidence to shew that he acted otherwise than honestly in making the investment. He did so under the advice of Carpenter, and upon the faith of representations by Carpenter that the investment was a good one. The loss, if any, to the trust estate is due to the dishonest act of Carpenter, who, by taking a bribe, has precluded himself from saying that he "thought fit" to make the investment in any fair sense of those words.

[KEKEWICH J. intimated a doubt whether, if Carpenter were made liable to replace the 3000*l.*, the whole of the money invested, he could be also held liable to repay the 300*l.* which he received as a bribe to induce the making of the investment.]

G. Henderson, for the defendant Carpenter. This defendant admits his liability to account for the 300*l.*, but not in respect of the improper investment. If, however, he is held liable for the investment, he cannot be called upon also to account for the 300*l.*, which in that case was a profit which he made not out of the trust estate, but in respect of his own investment.

Renshaw, Q.C., in reply, submitted that the estate of Clement Smith was liable, and that the 300*l.* was in law money received by Carpenter, at the time of the investment, as agent

of the trust estate, and which he was thenceforward bound to account for to his principals.

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KEKEWICH J. The question in this case turns upon the meaning of the investment clause in this testator's will. [His Lordship read the words of the will as above stated, and continued :—]

What is the meaning of the words "upon such stocks, funds, and securities as they shall think fit"? I have been referred to two cases: *Lewis* v. *Nobbs* (1), before Hall V.-C. in 1878, and *In re Brown* (2), before Pearson J. in 1885. It is to be observed that the earlier case was not cited in the later one. In each of those cases the words were different from those used in this will. In *Lewis* v. *Nobbs* (1) there was a proviso that "as often as the trustees should think it expedient so to do they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever." These words are peculiar, because, apart from the reference to "other" securities, which must have meant other than those previously mentioned, there is the use of the general word "whatsoever." In *In re Brown* (2) the testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names or under their control "in such mode or modes of investment as they in their uncontrolled discretion should think proper." Unfortunately, I do not find in either of those cases any exposition of the general duties of trustees under such an investment clause; but I do find that in each of those cases the learned judge before whom the case came gave a wide interpretation to the words. And that seems to me to be right, because to put a narrow interpretation on the words would be, in effect, to strike them out of the will altogether. Mr. Renshaw has argued that the words must be read as meaning such "proper" stocks, funds, and securities as the trustees should think fit, and that in the case, for instance, of a mortgage, they would not be authorized to invest without taking a valuation, because it is the duty of a trustee to procure

(1) 8 Ch. D. 591. (2) 29 Ch. D. 889.

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a valuation before lending trust money on mortgage security. I should say the words clearly authorized them to invest money on mortgage if they, having a sufficient knowledge of the property, thought that the investment was desirable. The question is, what is the meaning of the words "shall think fit"? I have formed a very strong opinion that they mean "shall honestly think fit." It would be futile for a trustee to say that he thought fit to make an investment which he knew to be wrong. The Court would say that he ought not to think fit so to do, and would come to the conclusion that he did not in fact think fit. There have been many cases in which a trustee has attempted to say that he has exercised his discretion in a particular way, but the Court has replied that in truth he exercised no discretion at all. What I have to consider is whether these trustees thought fit to make these investments in the sense that they did so honestly, and with due regard to their fiduciary position, as holding the money in trust for other persons. I cannot go so far as to say that these trustees were bound to look at the matter in the same way as trustees with a less wide discretion ought to look at it, for that would be to strike the discretionary words out of the will. As regards the colonial inscribed stocks, there can be no question at all: it was clearly competent to the trustees, if they thought fit, to invest in those stocks in the names of both of them.

There remains the question as to the debentures. I suppose no very prudent man would invest money in the debentures, in the nature of a floating security, of a limited company. But it is familiar to us all that there is a class of men, who are prudent but not very cautious, who do invest money on such debentures and regard them as a good security. It seems to me that it is quite open to a trustee, in the position of the trustees in the present case, to think fit to do that. Mr. Renshaw says that one reason why these trustees could not properly make this investment is because these are debentures payable to bearer. I do not think that is a conclusive reason.

Then comes the question whether the defendant Carpenter is liable on other grounds, and, if he is, then whether the estate of Clement Smith is liable because he concurred in the acts of

Carpenter. I have been referred to the correspondence; and I have no doubt that the history of the case was that Clement Smith was extremely desirous to increase his income, and he looked at these debentures as a means of doing that. They were introduced to his notice by Carpenter; he had the prospectus and information about the matter; and, whether foolishly or otherwise, he thought it was a good thing for increasing his income as well as for other purposes. He appears to have trusted to the representations made to him by Carpenter and others; and I cannot say that he was wrong in the sense that he did not honestly think fit to invest in these securities. As regards Carpenter, it is otherwise. The fact that he took a bribe is conclusive against him. Honesty seems to be out of the question after that; and I must hold that he is liable to make good the loss occasioned by the investment. I do not think that it is a case of joint and several liability. One trustee may honestly think fit to do a thing, and the other may not. I must hold Carpenter liable, and hold that the estate of Clement Smith is under no liability.

It occurred to me to suggest a doubt whether Carpenter could be made to account for the bribe of 300*l.* if he made good the loss to the trust estate by the investment, because then it may be said that the 300*l.* was a bribe not for investing trust money, but for investing his own money. But the Court in cases of this kind does not proceed on the basis of punishment, but treats the trustee as having received such a bribe not on his own behalf, but on behalf of and as agent for the trust estate. On reflection, I do not see that that position is altered by the fact that a year, or it may be many years, after the bribe was received by the trustee he is required to make good the loss arising from the improper investment. The Court fastens on the transaction at the moment when it is done. The trustee did receive the money as agent, and upon that footing he must account for it.

Solicitors: *Webster & Webster; O. E. Dawson; Hunters & Haynes.*

C. C. M. D.

ROMER J.

1895

Aug. 8, 9;
Oct. 25;
Nov. 15.

HINDSON *v.* ASHBY.

[1894. H. 3703.]

River—Riparian Owner—Change of Bed—Accretions—Title by Possession.

Where a non-tidal river gradually changes its bed, and thereby adds land to or takes it away from one side, the rule that the riparian owner on that side enjoys the gain or has to bear the loss applies not only where two different persons own the opposite banks, but also where the river bed belongs to a separate owner and not to the riparian owners.

The question whether any particular land is part of the bed of a non-tidal river at any particular spot or time is one of fact, to be determined not by any hard and fast rule, but having regard to all material circumstances, including past and present fluctuations of the river, and the nature, growth, and user of the land.

THE plaintiffs, as the trustees of the church lands of Wyrardisbury, or Wraysbury, in the County of Bucks, were entitled to and in possession of land on the east bank of the River Thames, which was described in their title-deeds as being bounded by the River Thames.

In the present action they complained that the defendant, who was the owner of adjoining land on the same bank of, and also bounded by, the river, and of certain eyots in the river, had lately trespassed upon their land, and had constructed thereon a cement footpath, and that he threatened and intended to repeat and continue his acts of trespass. They therefore claimed (1.) an injunction restraining the defendant, his servants, agents, and workmen, from trespassing upon or interfering with the plaintiffs in the quiet possession of their lands, and from permitting the footpath to remain; (2.) damages; (3.) and (4.) costs and incidental relief.

The defendant, by his defence, said that the land on which the footpath had been constructed was not, and never had been, part of the plaintiffs' land, and that the plaintiffs were not entitled to it, and were not in possession of it; and he further said that the land on which the footpath had been made was his own soil and freehold, and that he was in possession of it.

Save as aforesaid, the defendant denied the allegations in the statement of claim.

The substantial question, however, was whether the land on which the footpath was made, which was on the margin of the river between the plaintiffs' high and dry land and the flowing river, belonged to the plaintiffs or to the defendant.

At the trial the defendant waived the point that the plaintiffs could not succeed in trespass because they were not in possession; and he admitted the plaintiffs' right of access to the river over the land in dispute. The plaintiffs admitted, for the purposes of the action, that the defendant was entitled to the bed of the river, and that at one time the bed included the land in dispute. Their evidence was adduced to shew that the river had gradually receded, and that by insensible degrees the land in dispute was added to their own adjacent land, and had ceased to be part of the river bed at the time (1893) when the defendant put down the concrete path. The path was put down by the defendant to afford his tenants of a neighbouring eyot a convenient access thereto.

The evidence established to the satisfaction of the Court that the Thames, apart from extraordinary floods or droughts, considerably changed its volume in the course of each year, and that it was much higher in some months of the year than in others. When the river was full, and particularly during the winter months, the land on which the path was, like much other land near the river but not forming part of its bed, was covered with water.

The defendant further claimed that, if the land had ceased to be part of the bed, he had been in possession of it for more than twelve years immediately preceding the time when the action was brought, and on this subsidiary point he adduced evidence sufficiently referred to at the end of the judgment reported below.

Moulton, Q.C., A. àBeckett Terrell, and *Baden Fuller,* for the plaintiffs. The plaintiffs shew their title to land down to the river and bounded by it as it then was. The water having gradually receded, the uncovered land is an accretion to their

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former tenement, and belongs to them as riparian owners, and they do not lose their title to it because they have not ploughed it up or remained in continuous physical possession of it. The defendant will first say that the land in dispute is part of the bed of the river, in which case the plaintiffs are riparian owners. If so, the creation of a concrete path between them and the stream is a clear invasion of their rights, including the right to have the river flowing in an unchanged condition by their bank. If, so flowing, it eats away their land gradually, their riparian boundary is altered to their loss. But if the river gives to them gradually and does not take, their riparian boundary is altered to their gain, and the land added to their territory becomes theirs. It is immaterial that originally the defendant was the owner of the soil of the bed of the river. He has no right to the accretions constituted by the gradual recession of the stream. He takes the soil of the river subject to any gradual change on one bank or the other.

The defendant is confusing the presumption ad medium filum with the law as to accretions.

What is the bed of the river is a question of fact. The bed certainly does not include everything which in winter only is covered with water. It is what is always covered with water in an average year.

The defendant's defence that he has a statutory title is inconsistent with his defence that the land is part of the bed; and, moreover, the evidence in support of the second defence is insufficient.

Bucknill, Q.C., and *Stuart Moore*, for the defendant. The land in dispute is part of the bed of the river, and belongs to the defendant.

If it has ceased to be part of the bed, he has acquired a statutory title to it.

"Fresh rivers of common right belong to the owners of the soil adjacent, so that the owners of one side have the propriety of the soil usque filum aquæ; and if a man be owner of the land on both sides, in common presumption he is owner of the whole river." "But special usage may alter that common

presumption; for one man may have the river and others the soil adjacent": Stuart Moore on the Foreshore, 3rd ed., 370, 371, citing Hale's De Jure Maris. The presumption that, by a conveyance describing the land conveyed as bounded by a river, there is an intention to pass the bed usque ad medium filum may be rebutted by surrounding circumstances: *Duke of Devonshire* v. *Pattinson*. (1) Where the bed or soil is said to belong to the riparian owner the reference is to the origin of the title only. The right to the bed is not inseparably bound up for ever with the right to the bank: *Smith* v. *Andrews* (2); *Blount* v. *Layard*. (3) It is not disputed that an addition to the land of a riparian owner goes to him, where it is caused by the river gradually receding. But the question whether there has been gradual accretion is a very delicate one, and cannot be answered without ascertaining what is the average flow of the river. There was no such gradual accretion in the present case.

[ROMER J. Suppose the plaintiffs' bank got gradually eaten away by the river, in whom would the soil then below the river be vested?]

The ownership would follow the line of the river as it gradually changed; but a right of fishing would follow the river.

There is no authority as to what is to be taken as the line marking the margin of the bed of the river in order to ascertain whether accretions to its banks have taken place. It may be that the bed is that which is covered by water in the course of its flow during any part of an ordinary year; or, by analogy to the mode of fixing the line when there is land bordered by the sea, the margin of the bed may be found by taking a line midway between the point of average highest flow and the point of average lowest flow: *Scratton* v. *Brown*. (4) But, in the case of a river, to take the average during any one year would not be the proper mode of ascertaining the line. And although, if to the plaintiffs' meadow land the river added some manurable and dry land, that would

(1) 20 Q. B. D. 263.
(2) [1891] 2 Ch. 678, 697.
(3) [1891] 2 Ch. 681, n.
(4) 4 B. & C. 485.

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be accretion, the mere exposure of a strip of slime is not an accretion.

The question as to what, according to American law, are the bed, the water, and the banks of a river, is described in Gould on Waters, 1st Ed., ch. 3, s. 41, p. 94 (1) (citing Callis on Sewers, p. 77; Woolrych on Waters, p. 31; *Rex* v. *Inhabitants of Oxfordshire* (2); *Rex* v. *Trafford* (3); *Reg.* v. *Inhabitants of Derbyshire* (4), and other cases); and s. 45, p. 101, citing *Howard* v. *Ingersoll.* (5) If the land has ceased to be bed of the river, the defendant for more than twelve years has had such a possession of it as entitled him to deal with it as he likes so long as he does not interfere with the plaintiffs' access to it.

[They also referred to *Foster* v. *Wright* (6); *Attorney-General* v. *Chambers.* (7)]

Moulton, Q.C., in reply. The only user which the defendant can shew is a dry user, of recent date, by putting down the concrete path. That act is not sufficient to support the second defence, and it is inconsistent with the first defence.

1895. Nov. 15. ROMER J. The substantial question I have to decide is whether the plaintiffs are entitled to the piece of land on the margin of the Thames, the subject-matter of the action, or whether the defendant is entitled to the land. At one time the defendant had insisted on a subsidiary point—namely, that in any case the plaintiffs could not succeed in this action, being one based on trespass, because it was alleged by the defendant that the plaintiffs were not in possession at the time of action brought. But this subsidiary point was waived by the defendant before me, and both parties desired me to decide the substantial question between them mentioned above. The plaintiffs' case is shortly this: They admit, for the purposes of this action, that the defendant is entitled to the bed of the river in the immediate neighbourhood of the land in dispute,

(1) A Treatise on the Law of Waters, including Riparian Rights, &c., by John M. Gould, of the Boston Bar. Chicago. Callaghan & Co. 1883.
(2) 1 B. & Ad. 289, 301.
(3) 1 B. & Ad. 874, 877.
(4) 2 Q. B. 745, 756.
(5) 54 U. S. 381.
(6) 4 C. P. D. 438.
(7) 4 De G. & J. 55.

and that at one time the bed of the river included this land. But they say that by a gradual process the river has receded, and that this land was added by insensible degrees to the adjacent land, and ultimately ceased to be part of the bed of the river and became part of the land of the plaintiffs as the riparian owners at that part of the river. They say that this was the condition of matters when the defendant did that which gave immediate rise to this action—namely, put down the concrete path to afford his tenants of a neighbouring eyot a convenient path and access to that eyot, and they further say that this condition has continued to the present time. Now, if the plaintiffs establish this, then, subject to any special defence the defendant may raise, they would be entitled to judgment in this case. For it is clearly settled that in the ordinary case where two different persons own the opposite banks of a non-tidal river, and each is entitled to the bed of the river adjacent to him up to the centre, then, if the river, not by sudden action or by leaps, but by a gradual and almost insensible process, changes its bed and adds land to one side, or takes land away from it, the centre of the new bed becomes the boundary of the two properties, and each owner is entitled to enjoy the gain, or has to bear the loss occasioned to his land by the shifting of the river. (See *Foster* v. *Wright* (1), where all the earlier authorities are mentioned and examined.) And I can see no distinction in principle between the ordinary case I have referred to and the somewhat unusual case before me, where the river bed belongs to a separate owner, and not to the riparian owners.

I therefore proceed to consider the defences raised by the defendant. The main defence is that the land in dispute has never ceased to be, and is still, part of the bed of the river. Now, in considering this question, there has been considerable discussion as to how the bed of the river is to be ascertained. Of course, if a river preserves a tolerably even flow, and does not fluctuate in volume much, except on extraordinary occasions, there is no difficulty in determining its bed. But when the river is one like the Thames, that is to say, one which, apart from extraordinary floods or droughts, changes considerably in

(1) 4 C. P. D. 438.

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volume in the course of each year, being, as a rule, much higher in some months of the year than in others, then the question as to how its bed is to be determined is not so easy. Various suggestions have been made in the case before me by the opposing sides. It has been suggested, inter alia, (1.) that any land which is covered by the river in the course of its flow at any time during an average or ordinary year is of necessity to be considered part of the river; (2.) that no land is to be considered as part of the bed which is not always covered by the river throughout any ordinary or average year; and (3.) that, by some sort of analogy to the method of fixing the margin of the bed of the ocean on the seashore, the margin of the bed of the river is to be ascertained by taking a line midway between the margin of the bed covered by the average highest flow and of that covered by the average lowest flow of the river. But, in my opinion, none of these suggestions are well founded. I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growths and its user. I know of no authority in English law which has expressly decided this, but on principle I think it ought to be so decided. In the United States the question has been judicially considered, and a view expressed in accordance substantially with that formed by me. I find that in the case of *Howard* v. *Ingersoll* (1), before the Supreme Court of the United States, Curtis J. expresses himself as follows with reference to the question; and though, of course, his decision in nowise binds our Courts, yet I cite his judgment because I think that, in substance, it is in accordance with the English law on the point. He says: "That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both,

(1) 54 U. S. at p. 427.

produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. Something must depend also upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water."

On this footing I have now to decide the question of fact as to the piece of land now in dispute, and on the evidence as a whole I find that at the date when the defendant made the concrete path, and thenceforth to the present, the land formed no part of the bed of the river; and, further, I find that it ceased to be part of the bed of the river, and became an accretion to the adjacent land belonging to the plaintiffs, not by leaps and bounds, but by a gradual and almost insensible process. I need not here refer in detail to the evidence which has led me to the above conclusions. I will only say that it appears to me impossible for the defendant to successfully contend, looking at the present condition of the land, and his own act in putting down the concrete path, and his attempted user of it as a way for his

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tenants, that this land still forms part of the bed of the river. It is true that at times when the river is full, and particularly in the winter months, this land is under water, but so is much land near the river which without doubt forms no part of the bed. And, but for the fact that this land did formerly form part of the bed of the river, I doubt whether any one would have had the boldness to contend that in its present state and under its present conditions it formed part. I cannot help suspecting that the defendant put down the concrete path, and tried to acquire title to the land for the very reason that it had acquired additional value and importance as being riparian, and because he hoped to be able entirely to exclude the plaintiffs from their position as riparian owners and from having access to the river. The defendant, however, at the bar before me, has disclaimed this view, and has conceded that in any point of view the plaintiffs are entitled to access to the river. I do not, however, find this concession in favour of the plaintiffs in his pleadings.

On the above findings of fact the plaintiffs are clearly entitled to this land, subject only to a consideration of the remaining defence raised on behalf of the defendant. That defence is in fact inconsistent with the first and main defence which I have alone dealt with. For by it the defendant takes up this position: He says that the land had ceased to be part of the bed of the river for more than twelve years before action brought, and that during all that period he alone has been in possession of it, and has thereby acquired a title to it under the Statute of Limitations. In my opinion, the defendant has failed in substantiating this case. It is difficult, if not impossible, to say exactly when this land ceased to be bed of the river and became part of the adjacent bank; but the defendant has utterly failed in establishing before me that he has been as against the plaintiffs for twelve years in possession of this land since it ceased to be part of the river bed. In truth, the defendant, conceding (as he does) that the plaintiffs have a right of access over this land to the river, has rendered it almost hopeless for him to contend that he has been in possession as against the plaintiffs. If the plaintiffs had ceased to be in possession of the land, how could

they have acquired or retained the right of access? The fact is that there has been nothing done since the land ceased to be river bed which would enable the defendant to say that the plaintiffs have lost possession of their property down to the verge of the river. The first act of the defendant which, unchallenged, would or might, in my opinion, have amounted to a taking possession of this land as dry land forming part of the bank was the putting down of the concrete path, and this act was immediately complained of by the plaintiffs, and led to this action being brought. With regard to the other facts relied on by the defendant in support of his claim of possession for the statutory period, I need only refer to two. No doubt, the defendant did dig a small ditch in this land on the site of which he subsequently put the concrete, and from time to time he cleaned this ditch out. But this ditch was not noticeable from the plaintiffs' land, and when it was first made and for some time afterwards the land was in its transition state; and I think it would be extremely hard on riparian owners like the plaintiffs if they were to be held excluded from their position and no longer entitled to the land down to the margin of the river by reason of acts of the kind I am now considering done on the margin of the river in its transition state. The only other fact I need refer to is the planting of trees on this land by the defendant or his predecessor in title and the occasional trimming of these trees. But these trees were planted at a time when the land did, in my opinion, form part of the river bed; and the fact that some trimming of the trees was done by the defendant or on his behalf down to the time that I have called the transition period, and possibly even for a short time after the land finally passed into its present condition, is not sufficient to support the defendant's claim. As I have already said, the defendant has failed to prove before me his plea of possession for the statutory period of this land as land not part of the river bed, and, this being so, his second defence also fails.

It follows that the plaintiffs are entitled to succeed, and I make the following declaration in their favour: "Declare that the land in dispute was at the time when the defendant put down the concrete complained of and has since continued to be

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and now is land belonging to the plaintiffs and not part of the bed of the river." Then there will be given liberty to apply to enforce the declaration if necessary and liberty to apply generally. And I order the defendant to pay the costs of the action.

Solicitors for plaintiffs: *S. Vigers & Richardson.*

Solicitors for defendant: *Soames, Edwards, & Jones, for Rowell & Lomas, Rickmansworth.*

F. E.

In re AMBITION INVESTMENT BUILDING SOCIETY.

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Nov. 6, 7.

[00106 of 1895.]

Building Society—Withdrawals—Priorities—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32.

The question whether an investing member of a building society may withdraw so as to obtain priority over other members does not depend on the answer to be given to the question whether the society was solvent or insolvent when his notice matured, or on the answer to be given to the question whether the members or officers of the society then knew that the society was insolvent. The line is to be drawn at the time when there is a stoppage of the society's business, or a recognition, by those who are entitled to form a judgment, that the business must be stopped.

THE Ambition Investment Building Society was registered under the Building Societies Act, 1874, on November 25, 1882, and rule 1 of its rules stated that the objects of the society (which was permanent) were to raise a fund for making advances to members upon the security of freehold, leasehold, and copyhold property, by way of mortgage, pursuant to 37 & 38 Vict. c. 42.

The other rules material to this report were as follows:—

"3. An annual general meeting of the members shall be held in the month of February in every year, at which meeting a balance-sheet of the accounts, regularly audited, together with a report from the directors of the state of the affairs of the society, shall be laid before the meeting."

"16. The holder of a share, upon which not less than six months' subscription has been paid, and in respect of which no advance has been made, shall be deemed an investing member as to such share, and shall be entitled to vote in respect of such share, and the holder of any share upon which an advance has been made shall be deemed a borrowing member, and shall be entitled to vote."

"21. Any member may withdraw all or any of his shares upon giving one month's notice in writing to the secretary, when such member shall be entitled to receive back his net

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monthly subscriptions, with such portion of the profits realized as may have been posted to his credit, together with such interest as the directors in their opinion consider the state of the society's business will allow, such interest to be calculated up to the end of the month preceding the date of the notice. If more than one member shall give notice to withdraw, they shall be paid in rotation according to priority of notice; provided always that widows and children of deceased members shall have precedence."

"22. . . . . The directors may receive money on deposit or loan at interest from any person or company to be applied to the purposes of this society, but the total amount of such deposits at any one time shall not exceed two-thirds of the amount for the time being secured to the society by mortgages from its members."

"29. Every person entering the society shall pay such sum per share entrance fee as the directors may from time to time prescribe. The monthly subscription for investment shares shall be 5*s*. per share, commencing at the meeting when such shares are first subscribed for, and shall be continued at each succeeding monthly meeting until the value of 10*l*. per share be thereby realized. Any member may pay twelve months' subscription in advance, or the shares may be fully paid at any monthly meeting for subscriptions, upon such terms as the directors may from time to time determine. Upon the full amount of any share being paid-up, the society shall, in all cases, issue a certificate for each share to the holder thereof, and the pass-book or receipt shall be returned to the society. Preference shares shall not be issued."

"32. All receipts whatsoever, arising from the several fees, fines, or other payments required on behalf of the society by these rules, as well as any receipts on account of interest for money belonging to the society, and invested upon securities in manner set forth in these rules, shall form part of and belong to the funds of this society. The funds of the society shall be applied solely for the purposes set forth in these rules—First, in payment of all expenses of the society, authorized pursuant to these rules by the directors and certified by the auditors as

being correct, and debts due by the society; secondly, in making advances to members; thirdly, in repaying subscriptions to members withdrawing their shares; and, lastly, in payment of the interest, dividends, or bonuses whatsoever, due to the holders of unadvanced shares. At the termination of each year of the society interest not exceeding 5*l.* per centum per annum out of the profits shall be posted to the credit of members on their investment shares, to be reckoned according to their monthly balances, whether such balances shall form part of subscriptions only, or interest and bonuses previously credited in addition thereto. The directors may from time to time declare such bonuses out of the surplus profits (after carrying such amount thereof as they may deem expedient to a reserve fund), such bonus to be placed to the credit of members in respect of their investment shares, in the same manner as the interest hereinbefore mentioned. The interest and bonuses placed to the credit of members on their investment shares shall become payable only when such shares shall be paid up or withdrawn; but the owners of paid-up shares remaining in the society may withdraw the interest to which they shall be entitled, and the same shall be payable yearly, and the bonuses declared in respect of such paid-up shares remaining in force shall be payable with the yearly dividend. Subscriptions not duly paid will not be credited until the monthly meeting following (from which time interest will be calculated). The directors shall have power to declare an interim dividend in July on all investment shares should they consider the state of the society's business will allow of it."

"39. The society shall be dissolved if the dissolution thereof be resolved upon by the vote of three-fourths of the members present at a special general meeting of the society convened for that purpose, and such meeting, by a resolution passed in like manner, may also appoint liquidators to conduct the winding-up of the society, and fix their remuneration; and, in default of such appointment, the directors for the time being shall be ex-officio liquidators."

The society commenced carrying on business early in 1883, and shares were issued and advances made; but in 1890 the

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society had practically no new business. The accounts were annually made out and audited, including those for 1890, which shewed a balance at the bank of 6*l.* 12*s.* 2*d.* on the cash account, and a profit on the profit and loss account of 203*l.* 16*s.* 3*d.* The balance-sheet, which was dated January 28, 1891, shewed a surplus of 203*l.* 16*s.* 3*d.*, and with it the directors issued a report in which they expressed their regret that during the past year the society had practically had no new business—a state of affairs which then shewed no sign of improvement. They pointed out that this, and the fact that the capital of the society during the year had been considerably decreased by withdrawals, had caused them to arrive at the conclusion that in the interests of the shareholders the society should be dissolved. After referring to a proposed special general meeting at which a resolution to that effect was to be moved, the directors expressed the opinion that if the members decided to dissolve, and this was done economically, the capital would be returned in full. The directors also stated that the usual dividend of 5 per cent. would be payable at the close of the meeting. On the report a notice was indorsed convening the annual meeting for February 12, 1891.

On February 5, 1891, pursuant to a requisition, the secretary sent a notice or circular to the members convening a meeting for February 12, 1891, to be held immediately after the close of the annual meeting, to consider resolutions for dissolution of the society and the appointment of liquidators. At the annual meeting on February 12, 1891, the report and balance-sheet were approved, and at the subsequent meeting on the same day it was resolved by a vote of three-fourths of the members present that the society should be dissolved, and that R. Wills, C. Haslett, and R. H. Hodge should be appointed liquidators.

Prior to February 12, 1891, notices of withdrawal were received from several non-borrowing members. Some of them were sent prior to, and some immediately after, February 5; but one, that of Mrs. A. A. Lark, had been received on January 10, 1891, and this was the only notice which had matured on February 12, 1891.

The liquidators continued the business with a view to

winding up the society's affairs, and paid off the outside creditors and depositors, and intended to pay a dividend to the holders of investment shares; but questions arose as to whether some of the withdrawing members were entitled to priority over others of them, and over shareholders who had not given any notice of withdrawal. With a view to obtaining the decision of the Court as to the members' priorities, a special resolution was passed and confirmed, at meetings held on March 19 and April 4, 1895, for voluntary liquidation and the appointment of the same persons as liquidators. And at the meeting of April 4, 1895, Hodge was authorized by three-fourths of the members present to file a petition on behalf of the society asking that the voluntary winding-up might be continued under the supervision of the Court.

The petition was presented on April 19, 1895, and a supervision order was made on it on May 1, 1895.

The liquidators issued a summons for the determination of the questions (1.) whether Mrs. Lark and others (members who had given notice of withdrawal), or any and which of them, or any and which of the other persons who had given notice of withdrawal after February 5, 1891, were or was entitled to priority over the other holders of investment shares in the society in its surplus assets; and (2.) if any such persons were entitled to such priority, what were their priorities inter se.

The summons was adjourned into court, and heard before Vaughan Williams J. on November 6 and 7, 1895.

Fawcus, for the liquidator, stated the facts of the case, and for shareholders who had not given notice of withdrawal argued as follows:—Members who gave notice to withdraw did not thereby obtain priority. The insolvency of the society was known to everyone when the notices were given. Even Mrs. Lark must be taken to have known of the insolvency when she gave notice. But if she did not then know, her notice did not mature till after the circular was given, and therefore it does not give her priority: *In re Sunderland 36th Universal Building Society* (1); *Carrick* v. *North British Building Society* (2);

(1) 24 Q. B. D. 394. (2) 22 Scottish Law Reporter, 833.

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Tosh v. *North British Building Society* (1); *Barnard* v. *Tomson*. (2)

All the other notices were given after notice of the circular, and are bad. Moreover, none of them matured until after dissolution, which determined the right to withdraw: Building Societies Act, 1874, s. 32.

John Henderson, for Mrs. Lark. The directors had not issued their report when Mrs. Lark's notice was given, and she was then unaware of the society's insolvency. Under rule 21 her notice matured before the dissolution of the society. If it was insolvent when the notice was given, the insolvency was not notorious, and therefore the right to withdraw was not put an end to: *In re Sunderland 36th Universal Building Society* (3); *Carrick* v. *North British Building Society*. (4)

Before anything had occurred to alter Mrs. Lark's rights her notice had matured. [He also referred to *Walton* v. *Edge*. (5)]

Chester Jones, for a withdrawing member, whose notice was given before she received the circular.

What occurred was not a winding-up, but a dissolution under the rules, and the rules, apart from the decided cases, authorize a member to withdraw at any time, notwithstanding dissolution. Sect. 32 of the Building Societies Act provides for dissolution in various ways, as in this case, or by an instrument of dissolution; or by a supervision order; but although resolutions may be passed for voluntary winding-up, they are not effective until a supervision order has been made: Palmer's Winding-up Forms, 2nd ed. 558.

[VAUGHAN WILLIAMS J. referred to Buckley on Companies, 6th ed. p. 176.]

The question is not when the winding-up began, but when insolvency was known to everyone interested.

[VAUGHAN WILLIAMS J. Either the word "notoriously" in *In re Sunderland 36th Universal Building Society* (3) is a mistake, or it must refer to the knowledge of the officers of the society. The rule must be construed to ascertain out of what

(1) 11 App. Cas. 489; 24 Scottish Law Reporter, 128.
(2) [1894] 1 Ch. 374.
(3) 24 Q. B. D. 394.
(4) 22 Scottish Law Reporter, 833.
(5) 10 App. Cas. 33.

funds, and on what conditions, a member may withdraw his share of the capital. If the claims of outside creditors trench on those funds, the rule ceases to give a withdrawing member the right to have the funds dealt with as if they were intact.]

It was not known until afterwards that the assets were not worth the amount stated in the balance-sheet, so that insolvency was not notorious to everyone. The right to withdraw would be absolute if there had been no dissolution. The rule in the *Sunderland Case* (1) was different from the rule in this case. The withdrawal must be from the funds. The rule applies in a winding-up: *In re Blackburn and District Benefit Building Society* (2); *Walton* v. *Edge*. (3) And if dissolution is something less than a winding-up, it is immaterial that notice did not mature till after the resolution.

Hansell, for members who had given notice after issue of the circular. We do not claim any priority. All the members should share equally. The operation of the rule ceased when the society became insolvent; but the Court has to consider whether the rules were intended to apply after the society ceased to be a going concern—namely, when it could no longer carry on its business—or after it had ceased to be commercially insolvent. Knowledge has nothing to do with the matter; if it has, it is the knowledge of the officers, not of the members.

Fawcus, in reply.

VAUGHAN WILLIAMS J. This case raises questions as to the priorities inter se of the non-borrowing members of a society which, having dissolved and paid all its outside creditors in full, has a surplus left.

The following dates must be referred to. The report and balance-sheet were issued by the directors on January 28, 1891. On February 5, 1891, a circular was issued by the secretary, acting under the instructions of the directors, convening a special meeting of the shareholders for February 12, 1891, to be held immediately after the conclusion of the ordinary general meeting, for the purpose of considering resolutions for dissolution, and on February 12 that special meeting was held.

(1) 24 Q. B. D. 394. (2) 24 Ch. D. 421. (3) 10 App. Cas. 33.

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There were various classes of non-borrowing members. Some of the non-borrowing members gave notices of withdrawal, and they assert that the giving of their notices under the circumstances of the case entitled them to priority amongst the members inter se after payment in full of the debts of the outside creditors. One of these withdrawing members was Mrs. Lark, who gave a notice to withdraw which matured on February 7 or 10—it does not matter which—between the dates of the issue of the circular and the holding of the meeting. In the case of every other withdrawing member who claims priority the notice did not mature until after the meeting had been held; it is immaterial, therefore, to consider on what date their notices were given.

Sometimes it is not an assistance to a judge to have a number of cases cited to him, because it is difficult to reconcile one with another. But here this is not the case, for the decisions cited before me form a continuous and uninterrupted current of authority. The last case cited is *Barnard* v. *Tomson*. (1) I do not propose to go into the facts of that case at length, because when one looks at the judgment delivered in it by North J., it is evident that he is only recognising and acting on the principles laid down in the judgment delivered by Mathew J. in *In re Sunderland* 36*th Universal Building Society*. (2) But it would seem, if North J.'s judgment is carefully considered, that the view which he takes is that the line ought to be drawn at the time when there is a stoppage of the business of the society, or it is recognised that the business must be stopped. There had in that case been a report by an accountant, and defalcations by a secretary had been discovered. The society had sustained great losses, and it might very well be a question whether the society ought not to dissolve and stop its business; but the officers of the society in their report to the members did not recognise the necessity for the society stopping, but thought it ought to go on, for in one clause (3) they said: "There is no reason why the society should not, with careful, judicious, and economical management, have

(1) [1894] 1 Ch. 374. (2) 24 Q. B. D. 394.
(3) [1894] 1 Ch. 390.

a good future before it." That being a case in which a question had obviously been raised as to the desirability of stopping business and the officers had reported against it, North J. says (1): "The result is, that I can find nothing whatever, prior to the instrument of dissolution, to indicate such a state of things as would put an end to the operation of the existing rules upon the principles laid down in the cases to which I have referred. I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that all the notices to withdraw are good down to that time." What were the materials for which North J. looked, and which he could not find? He means that there had been neither a stoppage of business in fact nor a recognition by the officers of the society of the necessity for stoppage of its business. The question whether the society was solvent or insolvent at the date of a notice of withdrawal was evidently not one which appeared to him to be material.

North J. follows the decision in *In re Sunderland 36th Universal Building Society*. (2) In that case Mathew J., who delivered the judgment of the Court, states (3) what the question was, namely, whether the members who had withdrawn from membership before the winding-up order had thus become creditors, or whether, as the liquidator contended, the notices became inoperative because insolvency had become notorious before the notices had been given or become effective. After referring to the rule as to withdrawal, the answer is given as follows: "We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a

(1) [1894] 1 Ch. 390. (2) 24 Q. B. D. 394.
(3) 24 Q. B. D. 402.

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suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent."

A great deal of argument has been addressed to me as to the meaning of that judgment, and in particular as to what was meant where it referred to the insolvency of the society being notorious, or the society being no longer able to carry on its business. The Court did not mean to define in this portion of the judgment the conditions the happening of which would bring to an end the power of members to withdraw. The judgment means that the society in that particular case was unable longer to carry on its business, and that it was notorious that it was unable to meet its liabilities; but it does not lay down a rule that the right to withdraw depends on the knowledge of the members or officers of the society that the society is in an insolvent condition, although that condition was no doubt present in that case, and the society must be considered as having at that time stopped business.

That is how I understand the judgment in the *Sunderland Case* (1); and when I refer to *Walton* v. *Edge* (2) and *Carrick* v. *North British Building Society* (3), on which the judgment in the case of the Sunderland society is based, I find that the real question proposed by the judges was, "Had there been a stoppage of the business, or anything equivalent to it?" And they decided that, if there had been, the right to withdraw was determined. But it has not been held that insolvency of the society, even if known to its officers, is equivalent to stoppage of business; and I propose to deal with the present case on that basis.

Lord Shand, in *Carrick* v. *North British Building Society* (4), says: "In the case of *Tennent* v. *City of Glasgow Bank* (5), in which a number of authorities were cited and considered as to the effect of the stoppage of a business on the declared insolvency of the company, it was held that no change could thereafter be made in reference to the rights or status of the

(1) 24 Q. B. D. 394.
(2) 10 App. Cas. 33.
(3) 22 Scottish Law Reporter, 833.
(4) Ibid. 840.
(5) 4 App. Cas. 615.

members of the company, so that at least the rights of creditors might be preserved." That seems to me to shew that he recognised that the condition which would determine the right to withdraw was the stoppage of business or its equivalent. When it is considered who are the persons whose mutual rights were intended to be regulated by rule 21, it seems plain that stoppage of business or recognition of the fact that it is inevitable—and not insolvency—is the proper point at which to draw the line.

The relations of these persons must be borne in mind. They have in common put their capital into an adventure or concern which it was hoped would yield a profit. There is a proviso enabling capital to be withdrawn. How long is the right to withdraw capital to continue? It must continue as long as the adventure continues or its continuance is contemplated; but as soon as the adventure comes to an end, or the adventurers or their officers recognise that it must come to an end, from that moment every principle of justice requires that all who have joined in the common adventure shall in common bear the loss —and from that time the rule as to withdrawal ceases to operate, and there ought to be no applications for withdrawal. Had that point been arrived at in any of the cases before me? It clearly had been arrived at on February 12, when the resolution for dissolution was passed; but had it been reached before that date? It did not arrive simply because the society was insolvent, for a company which is insolvent may still in the hands of sanguine adventurers carry on its business. It did not arrive when the directors published their report on January 28; because, although the directors did not, as in *Barnard* v. *Tomson* (1), positively recommend the continuance of the business, they clearly put the case before the members as one in which it was perfectly reasonable for them either to go on or dissolve. Therefore, the report does not shew any recognition of the necessity for stopping the business.

Then what is the effect of issuing the circular? The report contemplated that the members would be called together to decide the question one way or another, and the fact that the

(1) [1894] 1 Ch. 374.

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meeting was convened to consider it leaves matters exactly where the report left them.

Under these circumstances, I have come to the conclusion that in Mrs. Lark's case there was not at any time before her notice matured—on February 7 or 10—either a stoppage of the business or a recognition of the necessity for it. She is therefore entitled to be paid in full in priority to the other non-borrowing members, and they must be paid pari passu without any priorities inter se.

I regard this as much like a partnership. An outgoing partner would be entitled to his costs out of the assets. These proceedings are the necessary complement of the dissolution, and the costs of all parties will come out of the funds.

Solicitors: *Lewis & Sons; Philip J. Rutland.*

F. E.

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Nov. 8.

In re BUILDING ESTATES BRICKFIELDS COMPANY.

PARBURY'S CASE.

[002 of 1894.]

Company — Winding-up — Contributory — Shares "Fully paid" — Original Allottee—Estoppel—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Before a company was incorporated P. gave W. 500*l.* on W. promising to procure an allotment to P. of one hundred fully-paid 5*l.* shares in the company when incorporated. W. was entitled under an agreement with the company (which was not filed with the Registrar of Joint Stock Companies) to fully-paid shares in the company, and after the company was incorporated W. had 100 of these shares allotted to P. as his nominee. The certificate stated untruly that the shares were fully paid. No part of the 500*l.* was ever paid to the company. P. sold twenty of the shares, and never repudiated any of them:—

Held, in the winding-up of the company, that it was estopped from denying that the shares were fully paid, and that P. was not liable as a contributory.

BEFORE the Building Estates Brickfields Company, Limited, was incorporated A. F. Parbury had a conversation with H. Granville Wright, a solicitor, in the course of which Wright

informed Parbury that the formation of the company was contemplated, advised him to invest money in its shares, and said that he would be able to procure Parbury an allotment of shares. Parbury agreed to invest 500*l.* in shares of the company, and Wright asked him to send him a cheque for 500*l.*, and said that as soon as the formalities of registration had been complied with he would procure Parbury an allotment of 100 5*l.* shares in the company, and would apply the 500*l.* in paying up the shares.

Parbury sent the cheque to Wright, and it was cashed on November 5, 1878.

The company was registered on November 19, 1879. Parbury was informed by Wright of this fact, and that 100 5*l.* shares had been allotted to him, and that his money had been applied in paying up the shares. About the end of November or beginning of December, 1879, Parbury received from the company a certificate, stating that he was "the proprietor of 100 shares of 5*l.* each, Nos. 618 to 717 inclusive," in the company, "subject to the articles of association of the company," and that he had "paid in respect of each of such shares the amount stated on the back of the certificate," namely, 5*l.* on November 28, 1879.

Parbury sold and transferred twenty of the shares, but retained the remaining eighty, and they were standing in his name in the register of shareholders when an order to wind-up the company was made.

The official receiver and liquidator placed the name of Parbury on the list of contributories in respect of eighty unpaid shares, and Parbury applied for an order that the list and the liquidator's certificate finally settling the same might be reviewed, and might be varied by excluding therefrom the name of the applicant in respect of the eighty shares, and, in the alternative, for an order declaring that the shares were at the date of the winding-up order fully paid up, or were to be deemed in favour of the applicant so to be.

The summons was adjourned into Court and heard on November 8, 1895.

The Court was satisfied by the evidence that Wright had

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never acted on the instructions given to him by Parbury; that Wright never applied for shares to be allotted to Parbury; but that, being himself entitled to fully paid-up shares in the company under a contract between himself and the company (which, however, was not filed with the Registrar of Joint Stock Companies), he procured from the company an issue of fully paid-up shares to certain parties, including Parbury, as his nominees. The 500*l.* paid by Parbury to Wright was never paid to the company.

Upjohn, for Parbury. There was no contract between Parbury and the company. He accepted the shares on the footing that the representation in the certificate that they were fully paid was true, and his position does not differ from that of transferees from the vendor, when the vendor's certificates state that the shares are fully paid: *In re Macdonald, Sons, & Co.* (1); *Carling's Case.* (2) He is therefore entitled, as against the company, to rely on the general law of estoppel: *Burkinshaw* v. *Nicolls.* (3) He had no knowledge or notice that the shares allotted to him as fully paid had not been paid for, and there were no circumstances which put him on inquiry as to whether payment had been made. [He also referred to *Blyth's Case* (4); *In re London Celluloid Co.* (5)]

E. S. Ford, for the official receiver and liquidator. An original allottee, like Parbury, holds the shares as unpaid: Buckley on Companies, 6th ed. p. 557. In *Burkinshaw* v. *Nicolls* (3), the person who was allowed to set up the estoppel was a transferee of shares, the certificates of which stated that they were fully paid.

[VAUGHAN WILLIAMS J. referred to the same case when in the Court of Appeal, sub nom. *In re British Farmers' Pure Linseed Cake Co.* (6)]

The distinction between an original allottee and a transferee is pointed out by Pearson J. in *In re Vulcan Ironworks Co.* (7)

[VAUGHAN WILLIAMS J. referred to *Jones* v. *Gordon.* (8)]

(1) [1894] 1 Ch. 89, 100.
(2) 1 Ch. D. 115.
(3) 3 App. Cas. 1004.
(4) 4 Ch. D. 140.
(5) 39 Ch. D. 190.
(6) 7 Ch. D. 533.
(7) W. N. (1885) 120.
(8) 2 App. Cas. 616.

The circumstances shew that Parbury was put upon inquiry as to whether the shares were paid for. The onus lies on him to shew that he did not take as original allottee, and he has not discharged it.

VAUGHAN WILLIAMS J. This is a very curious case, and it raises a new point.

Mr. Parbury was the allottee of 100 shares in the company, and he has dealt with twenty of them by selling them. That being the case, he has been placed on the list of contributories in the winding up in respect of the eighty shares remaining in his name because no cash has been paid for the shares; and it is contended, on behalf of the liquidator, that by virtue of s. 25 of the Act of 1867 Mr. Parbury is liable as a contributory to pay the whole amount of the shares in cash, inasmuch as no contract in writing, relieving him from liability to pay in cash, has been filed with the Registrar of Joint Stock Companies.

As far as I know there never has been a case in which an allottee of shares—and Mr. Parbury was an allottee—has been allowed to avoid the stringency of the provision of s. 25 of the Act of 1867 that cash is to be paid for the shares except by showing that a written contract within the section has been duly filed on or before the issue of the shares; but I have nevertheless arrived at the conclusion that Mr. Parbury, although an allottee of his shares, ought not to be on the list of contributories.

Mr. Upjohn has called my attention to *In re Macdonald, Sons & Co.* (1), and also to *Carling's Case* (2), and seemed to think that the judgments in those cases assisted him. I did not think they helped him much; but at all events I am not going to decide this case on the basis of either of those two authorities. The fact is that Mr. Parbury paid his 500*l.* to Wright before the company was formed, and asked him to use the money, when the company was incorporated, for the purpose of paying the amount necessary to be paid if the shares should be allotted to Mr. Parbury in pursuance of an application for shares on his behalf which he instructed Wright to make. If that

(1) [1894] 1 Ch. 89. (2) 1 Ch. D. 115.

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application had been made by Wright, and the allotment had been made in pursuance of it, Mr. Parbury would have become a member of the company. Everything essential to make him liable would in that case have been present, because there would have been a contract between him and the company, and his name would have been entered on the register. One knows that it very often turns out that a man is a member although one of those facts is not present; but, if Wright had acted on his instructions, both facts would have been present. But, in truth, Wright never did act on the instructions given to him. He never applied on behalf of Mr. Parbury for any shares in the company; but being entitled to certain paid-up shares under a contract between him and the company, he got the company under that contract to issue fully-paid shares to certain persons as his nominees, including Mr. Parbury, and thereupon the latter had a certificate issued to him for 100 fully-paid shares, which in truth and in fact were not issued under any contract between the company and Mr. Parbury, but were issued under the contract between Wright and the company.

The shares were allotted to Mr. Parbury, and he has dealt with some of them, and has never repudiated the shares at all. They stood in his name at the date of the winding-up order. But Mr. Parbury says that in respect of those shares there has been payment of the whole amount in cash. In truth, there has been no such payment. But Mr. Parbury says that he is entitled to rely on the general law of estoppel; that the certificate issued to him states that the shares are fully paid, and that, on that certificate being produced, the company is estopped from denying that statement.

In *In re British Farmers' Pure Linseed Cake Co.* (1) the liquidator sought to make liable a transferee of shares, in respect of which a certificate stating that they were fully paid had been issued, although the cash had not been paid; but the transferee was allowed to say, "I produce the certificate stating that the shares are fully paid, and shew that I acted on that certificate when I accepted a transfer of those shares, and the company cannot be heard to say that s. 25 has not been complied with."

(1) 7 Ch. D. 533.

That is the ground of the decision in that case. James L.J. says (1): "I think that the section . . . does not in the slightest degree alter the general law of the land as to the effect of the conduct of a representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have intrusted the management of their affairs." The law is there stated with the clearness and conciseness which one always finds in the judgments of James L.J. And Thesiger L.J. took exactly the same view. He says (2): "It seems to me clear that the present case comes within the general law as to estoppel, and that he"—namely, the alleged shareholder—"cannot be made liable."

That being so, let me apply the general law of estoppel to the case before me. It is not disputed that there has been a representation by the company, by the certificate, that the shares were fully paid up. That being so, what further inquiry have I to make in order to see whether this estoppel arises? I have simply to inquire whether Mr. Parbury is a person who was unaware of the untruth of the representation and who acted upon the faith of it. It is not suggested that he was aware of the untruth of the representation or that he did not act upon it. I am told that the general law of estoppel ought not to be applied because there is a passage in Mr. Buckley's book (Buckley on Companies, 6th ed. p. 557), which says, "The original allottee and (subject to what follows) every subsequent transferee with notice holds the shares as unpaid." I am asked to say that, because of that, the original allottee, whether he had or had not knowledge that the shares were not paid up, and whether he acted or did not act on the faith of the representation in the certificate, is liable because he is an original allottee.

So to hold would not be giving effect to the general law of estoppel, or to James L.J.'s statement that the section does not in the slightest degree alter the general law of the land as to estoppel by conduct or representation. All Mr. Buckley means

(1) 7 Ch. D. 538. (2) 7 Ch. D. 540.

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is that generally an allottee has such notice that he cannot take advantage of the estoppel. I agree that the moment it is shewn that the shares were issued to Mr. Parbury as allottee the onus is on him to shew that they were not allotted under such circumstances as affected him with knowledge of the truth. But it seems to me that when you put in the minute of the company, and shew that the allotment was made under a contract not with Mr. Parbury, but with Wright, the presumption that Mr. Parbury was aware, either of the terms of the contract with Wright or of the fact that the shares were issued under that contract and not with himself, disappears. It seems to me that Mr. Parbury was misled. He believed that the shares were issued under the contract with him, and that the cash had actually been paid. It turns out that the shares were issued under a contract, not with him, but with Wright, and that the cash had not been paid. He had no knowledge of the truth, and is not prevented from relying on the estoppel.

During the argument I suggested that, although Mr. Parbury had no knowledge of the circumstances, he might be prevented from taking advantage of this estoppel because he was, at any rate, put upon inquiry—that he might have known the truth if he had chosen to do so, but wilfully abstained from knowing it. If that were so, I think Mr. Parbury would be prevented from relying on the estoppel. But what is meant when one says that a man is put upon inquiry, and therefore cannot rely on the representation made to him in the certificate? To my mind one cannot say that, unless the person who does not make the inquiry consciously abstains from doing that which as a matter of business he would do, and abstains because he would rather not know the truth. I see no evidence that that is so in the present case, and although, as I have said before, it is a new case in which the Court holds that an allottee is entitled to rely upon the certificate that the shares are fully paid up, in proof of the payment in cash in compliance with s. 25, yet I know of no reason why an allottee should not do so. It is not arguable that the general law of the land does not apply when once one gets to that point. The only ground upon which it can be argued that an allottee is not to take advantage of the

general law is because there is something in the fact of his being an allottee which prevents him from truly saying that he was not aware of the true circumstances, or that he acted upon the misrepresentation contained in the certificate. Generally speaking, that is true of an allottee because he is the person with whom the contract is made under which the shares are issued. But that is not so in the present case, and I see no reason why Mr. Parbury should have imputed to him either such knowledge of the truth or such conduct as would prevent him from relying on the estoppel. It will therefore be declared that the shares are to be deemed fully paid up.

Solicitors for applicant: *Bonner, Thompson, Burnie & Co.*

Solicitors for official receiver and liquidator: *Phelps, Sidgwick & Biddle.*

F. E.

C. A.
1895
Nov. 11.

SHOE MACHINERY COMPANY *v.* CUTLAN.

[1893 S. 4076.]

Patent—Action for Infringement—Judgment against Defendant—Leave after Trial for Defendant to adduce further Evidence on Appeal—Application for to Court of Appeal—Jurisdiction—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 4.

Anticipation was one of the grounds of defence to an action for infringement of patent, and the judge held the patent to be valid and granted an injunction against the defendant. After the trial the defendant gave notice of appeal, and applied to the Court of Appeal for leave to amend his particulars of objections, and to adduce further evidence of anticipations at the hearing of the appeal:—

Held, that under the Judicature Acts, and under rule 4 of Order LVIII., the Court of Appeal had jurisdiction to make the order, but that on the merits leave ought not to be granted in the present case.

With reference to the exercise by the Court of Appeal of the powers conferred by Order LVIII., r. 4, a patent action is in the same position as any other action.

Cropper v. *Smith* (26 Ch. D. 700; 10 App. Cas. 249) observed upon.

THIS was a motion made under Order LVIII., r. 4, by defendants, against whom judgment had been given in a patent action, for liberty to amend their particulars of objections in the action by adding certain further particulars alleging anticipations of the plaintiffs' letters patent by certain specifications published in this country before the date of the letters patent, the existence of which specifications was not known to the defendants prior to the date of the judgment; and also for liberty, upon the hearing of an appeal which the defendants had presented, to adduce further oral evidence as to the said alleged anticipations of the patent.

The action was brought by the plaintiffs to restrain the defendants from infringing four patents belonging to the plaintiffs for inventions of improvements in machines for lasting boots and shoes.

The action was tried before Romer J. in June last. The defendants gave particulars of numerous specifications, which

they alleged were anticipations of the plaintiffs' patents; but the learned judge found that the defendants had infringed two of the plaintiffs' patents, both of which were good patents and were not invalidated by prior anticipation.

The defendants gave notice of appeal, and then made the present application for the purpose of adding to the objections originally taken by them seven other prior anticipations. And they alleged that their failure to discover these anticipations and to include them in the particulars of objections delivered before the trial was caused by a mistake of the agent whom they had employed to search at the Patent Office on their behalf.

Terrell, Q.C., and *Micklem*, for the appellants. The Court of Appeal has jurisdiction to make the order for which we apply, if your Lordships, in the exercise of your discretion, think fit so to do; and we contend that it is a proper case for the exercise of such discretion: Order LVIII., r. 4; *Pirrie* v. *York Street Flax Spinning Co.* (1); *Cropper* v. *Smith* (2); 15 & 16 Vict. c. 83, s. 41. This case comes clearly within the principle laid down by Bowen L.J. in *Cropper* v. *Smith* (3), i.e., that it is the function of the Court to see that the question between the parties is properly brought before the Court; and in that case it was assumed that the Court of Appeal could have given leave to amend. The anticipations, evidence of which we wish to adduce before the Court, clearly invalidate the plaintiffs' patent, and it was entirely owing to the blunder of our agent that they were not discovered before the trial. [They also referred to *Baird* v. *Moule's Patent Earth Closet Co.* (4)]

Moulton, Q.C., and *W. Norton Lawson*, for the respondents. The Court of Appeal has no jurisdiction to give the leave applied for. At the trial of a patent action the Court may enlarge the particulars and give leave to amend; but after trial, when the parties are no longer in the same position, no such leave can be given. In s. 29 of the Act of 1883 the enactment that "Particulars delivered may be from time to time amended,

(1) 11 Rep. Pat. Cas. 429.
(2) 26 Ch. D. 700.
(3) Ibid. 710, 711.
(4) 17 Ch. D. 139, note to *Edison Telephone Co.* v. *India Rubber Co.*

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by leave of the Court or a judge" must be read as referring to the Court of primary jurisdiction, and the Court of Appeal is not the Court or judge pointed at in any part of the section: *Cole* v. *Saqui*. (1)

[RIGBY L.J. Under Order LVIII., r. 4, the Court of Appeal has all the powers and duties as to amendment and otherwise of the High Court.]

Sect. 29 is a special restrictive section applicable only to this class of cases. The issues are to be tried out in the High Court of Justice, and it never can have been the intention of the Legislature to permit one of the parties to add other issues after the trial. It would be unfair to compel or allow people to fight an action on varying issues. By the definition clause of the Act of 1883 (s. 117) "the Court" for the purposes of the Act means "the High Court of Justice."

[A. L. SMITH L.J. referred to *Pirrie* v. *York Street Flax Spinning Co.* (2) and *In re Deeley's Patent*. (3)]

According to *In re Deeley's Patent* (3) the defendants will be able to apply to have the plaintiffs' patent revoked in case their appeal is unsuccessful.

Terrell, Q.C., in reply. The Rules of the Supreme Court apply to patent actions as well as others. There is no reason why leave should not be granted; and unless we are allowed to introduce these additional specifications we shall not be in a position to lay the whole truth before the Court. [He referred to *In re Haddan's Patent*. (4)]

A. L. SMITH L.J., after referring to facts of the case to the effect above set forth, continued:—The defendants ask this Court first of all to overrule my brother Romer's judgment as regards the anticipations relied upon before him, and then to go on and form a new judgment of their own on the seven other anticipations. Speaking for myself, I should be very loth in a case like this to grant such an application, because it appears to me that if a person who infringed a patent—and these defendants have been found to have infringed two of these patents at

(1) 40 Ch. D. 132.
(2) 11 Rep. Pat. Cas. 429.
(3) [1895] 1 Ch. 687.
(4) 54 L. J. (Ch.) 126.

any rate—is entitled to come to this Court in this way, the Court of Appeal will not only be inundated with the rehearing of patent cases which have been tried by the learned judges in the Courts below, but will also be turned into a Court of first instance to try portions of patent cases that have not been brought before a Court below. I am very unwilling to grant any such liberty as that.

Now, on the part of the respondents it was contended that this Court has no jurisdiction under Order LVIII., r. 4, to grant the present application. I am of opinion that we have that power. It is said that according to s. 29 of the Patents, Designs, and Trade Marks Act of 1883 leave to amend particulars of objections can only be granted by "the Court or a judge," and that it has been decided in *Cole* v. *Saqui* (1) that the Court of Appeal is not a Court or judge within the meaning of that section, and consequently this Court has no power to give leave to amend the particulars of objections. In my opinion that argument is ill founded. Cotton L.J. in *Cole* v. *Saqui* (1), although deciding that the Court of Appeal was not a "Court or judge" within the meaning of s. 29 of the Act of 1883, expressly held that inasmuch as, when there is an appeal to this Court, this Court ought to make such an order as the judge who heard the case and from whom the appeal is brought ought to have made, there was in the Court of Appeal an inherent power to grant a certificate as to the particulars of objections, although that certificate is only to be given under the Act of 1883 by a Court or judge. But there is an express order which is applicable to the present case—Order LVIII., r. 4, which enacts as follows: "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact," and then there are enactments as to the restrictions or limitations under which that evidence is to be given. In my judgment a patent action stands, as regards this power of amendment and receiving further evidence, in the same position as any other action before the Court; and the distinction which Mr. Moulton invited us to

(1) 40 Ch. D. 132.

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draw between a patent action and any other action which comes to this Court has no real existence.

If authority were wanted as to there being jurisdiction in this Court to grant the leave to amend here applied for, I think the case of *Cropper* v. *Smith* (1), which afterwards went to the House of Lords is a strong decision to that effect. In that case Cotton and Fry L.JJ. both based their judgments upon the supposition that the applicants there had deliberately abstained from asking for liberty to amend, which was presupposing that if that application had been made there was jurisdiction in this Court to have granted it. Bowen L.J., with whose observations as regards amendment I emphatically agree, came to the conclusion that in the case then before the Court Hancock ought to be allowed to amend, even though he had not asked for liberty to do so. But I should point out that the amendment in that case was a very different one to that in this. That was the case of a patent action against two defendants, and one defendant had delivered particulars of objections. The co-defendant had not done so, and they went to trial in that state of the pleadings. The defendant who had delivered particulars of objections succeeded on his objection. The co-defendant who had not given particulars of objections did not succeed, and in this position they came to this Court. The defendant who had not delivered any particulars of objections did not ask leave to amend, but insisted that the plea on which he had relied at the trial, namely, want of novelty, covered the question of invention or no invention. The House of Lords on appeal said that he ought to have the benefit of what his co-defendant had set up in his particulars of objections. The whole thing had been fought out. There was really to be no new trial about anything. All that had to be decided was whether or not the one defendant who had not delivered particulars of objections should have the advantage at the trial of the particulars of the other. I have not the slightest doubt that in this action, although it is a patent action, the Court has full jurisdiction to bring into play the provisions of Order LVIII., r. 4.

(1) 26 Ch. D. 700; 10 App. Cas. 249.

But now comes the second question. It is entirely within the discretion of this Court whether that order shall be brought into operation or not; and I have to balance what will happen if the leave asked for were granted against what will happen if the leave were withheld. Now, if leave is granted, then, as I have already pointed out, when the appeal, brought by the defendants who have been unsuccessful in the Court below, comes before us, we shall not only have to try the twelve objections which they raised before my brother Romer, but also seven new ones which are now for the first time started. Nothing could be more inconvenient for this Court than to try such an appeal as that. Surely our time is fully occupied as it is? But I do not suppose that would have been a valid objection, if irreparable injury were done to the defendants in not granting this leave. How they came through their agent to miss the specifications, if they were such as to shew that these patents are invalid, I do not understand. The agent has filed no affidavit to account for it; but I pass that by. There is no irremediable damage to the defendants in refusing this application; whereas I think the greatest inconvenience would result if, under the circumstances of this case, the application were granted. In the case of *In re Deeley's Patent* (1) we held on a petition for revocation of a patent that there was no estoppel, because the person petitioning, having obtained the fiat of the Attorney-General for revocation of the patent, stands as one of the public and not as an individual, and although the person petitioning for revocation may be the same person against whom judgment had been given in a patent suit, there is no estoppel against him when he so petitions, because he appears as one of the public, and therefore the judgment which has been given in a matter in which he had been a litigant is no estoppel in his petition for revocation. In this case the present applicants, by the blunder, as they say, of their agent, have not been able properly to impeach this patent which has been found to be valid. But they might do that on a petition for revocation of the patent; and where there is anything like a primâ facie case made out no Attorney-General would refuse his fiat.

(1) [1895] 1 Ch. 689.

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Now, if these specifications which have been produced have the effect which it is said they will have, the defendants will be able, if so advised, to obtain the fiat of the Attorney-General, and to petition for a revocation of these patents. I am not expressing any opinion as to whether that petition for revocation would be successful or not. I am not cognizant of the facts; I only know what is stated in these affidavits; but one thing to my mind is clear, that there is no irreparable injury done to these defendants in refusing their application, and in my judgment it should be refused with costs.

RIGBY L.J. I am of the same opinion. As to the jurisdiction to entertain an application of this kind, and to make an order such as we are asked to make, I can entertain no doubt. In the words of Order LVIII., r. 4, there is no exception of patent cases; and it would be a very strange thing if we were to read by construction an exception of that kind into the order. Looking at it as a matter of authority, I can, I think, see plainly that each of the three judges of the Court of Appeal who had to deal with the case of *Cropper* v. *Smith* (1) also entertained no doubt as to their jurisdiction. When the case was carried to the House of Lords, I find that Lord Selborne, whose opinion was given there and concurred in by the other noble Lords, seems to have entertained no kind of doubt about it. What the majority of the Court of Appeal held in that case was that no amendment was necessary, that they had the materials for deciding the case, and they did decide the case in favour of the appellants, who were defendants in the action. That was confirmed in the House of Lords. It was there held (and it was a remarkable case in one respect) that the plaintiff, having had an opportunity of dealing in the action with every case of anticipation that had been brought forward, the anticipations having been expressly relied upon by one defendant, the Court ought not to close its eyes to the evidence before it, and while necessarily finding in favour of one defendant, find against the other—that in fact the last named defendant was not shut out from the benefit of the evidence which had been

(1) 26 Ch. D. 700; 10 App. Cas. 249.

given; and, taking that view, that he did not want leave to put forward pro formâ those objections which had been put forward and insisted upon and disposed of in the Court below. Then, again, there was the Irish case. (1) It may be we are not bound by that; but I must say that with the general scope of Bowen L.J.'s judgment in *Cropper* v. *Smith* (2) I agree; and if I did not feel myself bound, I should also concur in what was said in the Irish Court, or what was assumed and acted on in the Irish Court, namely, that there is jurisdiction. But it is quite obvious that that jurisdiction is to be exercised with a great deal of care. Lord Selborne in the House of Lords, while also approving of the general principles laid down in Bowen L.J.'s judgment in the Court of Appeal, goes so far as to say that even in that case, which was a strong one by reason of the fact that all the objections had been considered in the Court below, if they had not come to the conclusion as matter of law that the defendant was entitled to the advantage of those objections, he for himself, upon the special circumstances of the case, would not have been prepared to grant the amendment. There is an important expression of opinion by that noble and learned Lord as to the way in which matters ought to be dealt with here. If it were a question of construing the order only, and if it could be shewn that we were bound in every case to act upon it, then my conclusion would be quite different from the one that we have now arrived at. Of course, there must be a discretion in the matter, because to allow the objections to be amended without allowing additional evidence to be gone into would be idle, and the very words of the order distinctly make the permission to adduce further evidence discretionary.

Then the question is, How is that discretion to be exercised? I rely to some extent on the opinion expressed by Lord Selborne that it must be exercised with considerable caution; and I do not think it follows at all that because particulars of objection have been overlooked (it may be entirely by accident) in the Court below there should be an opportunity given of bringing them forward, with the necessary evidence, in the Court of

(1) *Pirrie* v. *York Street Flax Spinning Co.*, 11 Rep. Pat. Cas. 429.

(2) 26 Ch. D. 700; 10 App. Cas. 249.

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Appeal. I think the Court of Appeal has always been very cautious how it acted on Order LVIII., r. 4, and I think it ought to be; and though I do not accede to the argument of Mr. Moulton as to the jurisdiction, I think a good deal of what he said is important when you come to consider the question of discretion. It has been found that grievous injury arose in patent litigation unless you very strictly guarded the plaintiff against anticipations which are not clearly put forward. From my experience, there can, I think, be no doubt that all sorts of objections are put forward in particulars of objections, and that, as a rule, there is a sufficient opportunity given in the trial of every patent action for the alleged infringer to attack the plaintiff's patent, and shew that it has been anticipated. We ought to be cautious; and, knowing what we do of patent litigation, it appears to me that it would be a dangerous thing to allow any new objections to be brought forward unless there were some very special case made out.

Mr. Terrell tried to shew that this is a clear case, but he did not satisfy my mind. That what he said was plausible, I agree; but it did not convince me that this was a case in which justice could simply be done by allowing these specifications to be put in, and that thereupon there would be an end of the litigation. We could only say it is a matter which should be tried; we cannot form an opinion in that short manner as to which party would succeed. Nor do I think that would be a right test. Here there was what I understand to have been a very complicated patent, or rather series of patents, a great number of questions, and good opportunity given to the defendants to shew the invalidity of the patent, which they failed to do. I understand, also, that the anticipations which have been relied on in the Court below are to be relied on here upon appeal; and that the defendants desire to add half-a-dozen other objections, and to embark upon what may be a very long trial indeed of issues that were not before the Court below. This would lead to such great inconvenience, and would tend so much to increase the difficulties of patent litigation, that it would not be wise for us to exercise the powers in question unless it could be shewn that some final injury would be done

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to the applicants which could only be remedied by amending the particulars of objections and admitting the evidence suggested. I am certain that any case which is capable of being established by the evidence now forthcoming may be made use of on an application to revoke the patent, and that such revocation would be a complete relief to the defendants from the consequences of the injunction which, by their misfortune, as they think, they failed to defend themselves against in the Court below when they might have done so. Reserving full power in special cases to grant such relief as is here prayed, I do not think such a case is here made out as ought to induce us to grant it to the applicants, and the application must be refused with costs.

Solicitors: *Sharpe, Parker, Pritchards & Barham; J. H. & J. Y. Johnson, for Dennis & Faulkner, Northampton.*

W. W. K.

In re SALT.

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Nov. 27; *Dec.* 5.

Lunatic—Person lawfully detained as Lunatic—Person appointed to exercise the Powers of a Committee of the Estate — Power of Leasing — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 62—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120.

The person appointed to act, under s. 116 of the Lunacy Act, 1890, as committee of the estate of a person lawfully detained as a lunatic though not so found by inquisition may by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under the Settled Land Act, 1882.

In re Baggs ([1894] 2 Ch. 416, n.) distinguished.

THIS was an application by the official solicitor, the duly-constituted receiver of the estate of Catherine Salt, widow, a person lawfully detained as a lunatic though not so found by inquisition, that he might be at liberty to execute the power of leasing conferred by the Settled Land Act, 1882, upon the said Catherine Salt, as tenant for life under the will of her late husband, in respect of a public-house known as the Forge Inn at Cardiff.

The proposed lease had been approved by the master, subject

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to the question whether there was jurisdiction to make the order.

Ingle Joyce, for the applicant. The applicant has been duly appointed under sub-s. 2 of s. 116 of the Lunacy Act, 1890, to exercise the powers of a committee of the estate of Catherine Salt, who is a person lawfully detained as a lunatic though not so found by inquisition, within sub-s. 1 (*c*) of the same section. Sect. 120 enumerates the powers which the Court may authorize the committee of the estate of a lunatic to exercise, including (*h*) "any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." The power of leasing conferred by s. 6 of the Settled Land Act, 1882, upon a tenant for life is in general terms and applies to lunatics whether so found by inquisition or not, and it falls expressly within clause (*h*). The question would be free from difficulty but for the case of *In re Baggs* (1), where it was held that the Court had no jurisdiction to authorize the exercise of the power of sale conferred by the Settled Land Act, where the tenant for life was a person lawfully detained as a lunatic though not so found. But that case is distinguishable from the present, because s. 120 contains no clause corresponding to clause (*h*) expressly authorizing the exercise of a power of sale vested in a lunatic as a limited owner; and it was held that the exercise of the power was not authorized either by clause (*a*) of s. 120, or by clause (*l*) of the same section, or by s. 128, although in *In re X.* (2) it was held that a power of sale vested in a lunatic tenant for life under a will could be brought within the two latter provisions. It was held, further, that s. 62 of the Settled Land Act, 1882, did not apply, as that section was limited to lunatics so found by inquisition. Assuming *In re Baggs* (1) to have been rightly decided, it points to a casus omissus in the Lunacy Act; but however that may be, that decision does not affect the present case. The inconvenience of refusing the application is obvious, as it will involve the trouble and expense of an inquisition.

Cur. adv. vult.

(1) [1894] 2 Ch. 416, n.

(2) [1894] 2 Ch. 415.

1895. Dec. 5. A. L. SMITH L.J. This is an application by the official solicitor, who has been appointed under s. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), to exercise the powers of a committee of the estate of Catherine Salt, a person lawfully detained as a lunatic though not so found by inquisition, for an order under s. 120 of that Act that he may be at liberty to execute the powers of leasing vested in Catherine Salt as tenant for life in the property in question under the will of her late husband, and in particular to execute a lease of a public-house called the Forge Inn, Cardiff, to an intending lessee; and the question is whether such an order can be made.

The proposed lease has been found by the master to be a beneficial lease to the estate of Catherine Salt and the persons entitled in remainder.

It is not a lease within the powers of leasing contained in the will, and the leasing powers in Part IV., s. 6, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), will have to be resorted to.

By s. 120 of the Lunacy Act, 1890, it is enacted, "The judge may, by order, authorize and direct the committee of the estate of a lunatic"—in which position the present applicant stands by virtue of s. 116, sub-s. 2—"to (*h*) execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends."

If the lease proposed to be executed had been a lease within the power contained in the will it would clearly have been within the express terms of this section; for Catherine Salt had a limited estate only in the property in question, she being tenant for life thereof.

By s. 6 of the Settled Land Act, 1882, it is enacted that "A tenant for life may lease the settled land or any part thereof"—to state it shortly, in the way proposed to be done in the present case.

In this state of facts where is the difficulty? It appears to me that there is no difficulty whatever, for the case falls within the express terms of the two Acts.

But it is suggested that there is a decision in this Court of *In re Baggs* (1), a widow, reported in the note to *In re X.* (2),

(1) [1894] 2 Ch. 416, n. (2) [1894] 2 Ch. 415.

C. A. 1895 *In re* SALT. A. L. Smith L.J.

which stands in the way. In my judgment it does nothing of the kind. In that case an application was made under s. 116, sub-s. 2, of the Lunacy Act, 1890, not for an order to lease, but for an order to "sell property belonging to the lunatic," she having only a life estate therein; and this Court held that the applicant could not bring that case within that sub-section because the property did not "belong" to the lunatic, she having only a life interest therein, and that he could not bring the case within the provisions of s. 62 of the Settled Land Act of 1882 because that section only applied to a tenant for life who was a lunatic so found by inquisition, which Martha Baggs was not; and this Court therefore held that it was a case not provided for by either the Lunacy Act of 1890 or the Settled Land Act of 1882.

But in my judgment the present case is expressly in terms provided for by s. 120 of the Lunacy Act, 1890. We are not, therefore, fettered by that case, for it does not apply to the present case; and in my judgment an order giving power to execute the proposed lease can be legally made, and we make such order accordingly.

RIGBY L.J. I am of the same opinion; but I should like to say in my own words how I think this case distinguishable from the case of *In re Baggs* (1); because unless the present case can be fairly distinguished from that decision we should be bound to follow it. In that case the application was for leave to exercise the power of sale conferred by the Settled Land Act, 1882, in the case of a person lawfully detained as a lunatic though not so found. Therefore it was plain that the applicant was not assisted by s. 62 of the Settled Land Act, because that section applies only to a lunatic so found by inquisition. Then an attempt was made to bring the case within s. 120 of the Lunacy Act, 1890. Among the powers comprised in that section are (*a*) a power "to sell any property belonging to the lunatic," and (*l*) "any power vested in the lunatic for his own benefit"; but clause (*a*) could not apply, because the property in question was not property to which the lunatic was absolutely

(1) [1894] 2 Ch. 416, n.

C. A. 1895 In re SALT. Rigby L.J.

entitled; nor clause (*l*), because the power of sale conferred by the Settled Land Act was not a power vested in the lunatic for his own benefit. But then it was said that this power of sale was a power vested in the lunatic as a trustee or guardian within s. 128 of the same Act; but the lunatic was clearly not a trustee or guardian within that section, and, there being no other provision in the Act which affected the question, it was held that the power of sale could not be exercised. But under clause (*h*) of s. 120 the Court has a clear authority to allow the exercise of the power of leasing conferred by the Settled Land Act, because that clause applies to "any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." In granting this application I think that we are in no way departing from the decision of the Lords Justices in *In re Baggs*. (1)

Solicitor: *The Official Solicitor.*

H. C. J.

C. A. 1895 Dec. 6.

DUNHILL *v.* NORTH EASTERN RAILWAY COMPANY.

[1895 D. 113.]

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 127–129—*Superfluous Lands—Compulsory Sale—Pre-emption.*

Land acquired by the A. railway company for the purposes of their undertaking was, within the period prescribed by statute for the sale by that company of their superfluous lands, compulsorily purchased by the B. railway company:—

Held, that such compulsory sale afforded no ground for inferring that the land was not required by the A. company for the purposes of their undertaking and was thus superfluous land within the Lands Clauses Act, 1845; and accordingly that the right of pre-emption under s. 128 of that Act did not arise.

Lord Carington v. *Wycombe Ry. Co.* (L. R. 3 Ch. 377) and *Hobbs* v. *Midland Ry. Co.* (20 Ch. D. 418) discussed.

IN 1871 the plaintiff's predecessors in title, the trustees and tenant for life under a settlement of the Potter Grange Estate

(1) [1894] 2 Ch. 416, n.

C. A. 1895 DUNHILL v. NORTH EASTERN RAILWAY CO.

in or near Goole, Yorkshire, sold and conveyed to the defendants, the North Eastern Railway Company, fifty-seven acres of land, forming part of the estate, for the purpose of the railway authorized by the North Eastern Railway Company's (Hull and Doncaster Branch) Act, 1863.

By the Lancashire and Yorkshire Railway Act, 1883, the Lancashire and Yorkshire Railway Company, whose line joined the North Eastern Company's Hull and Doncaster branch line, were authorized (s. 40) to take, by compulsion or agreement, certain lands near the junction and forming part of the North Eastern Company's unused land. At that time the plaintiff, William Henry Carter Dunhill, had, under the settlement, become owner in fee simple of so much of the Potter Grange Estate comprised in the settlement as had not been purchased by the North Eastern Company in 1871. Accordingly the Lancashire and Yorkshire Railway Act, 1883, contained, in s. 40, the following proviso: "Provided always, that nothing in this section contained shall alter, vary, abate, lessen, abridge, or in any manner affect or prejudice any estate, right, title, interest, or advantage of W. H. C. Dunhill, his heirs or assigns." In 1884, in pursuance of s. 40 of their Act, the Lancashire and Yorkshire Company took under their compulsory powers and purchased from the North Eastern Company seven acres of the latter company's unused land for 2247*l.* 10*s.*, and constructed thereon certain works referred to in their Act, consisting of junction works and sidings.

The period limited by the North Eastern Company's Act of 1863 for the exercise of their statutory powers, including their power of selling superfluous lands under s. 127 of the Lands Clauses Consolidation Act, 1845, was from time to time extended by special Acts, the last period expiring in July, 1894.

The plaintiff contended that, having, at the date of the Lancashire and Yorkshire Act of 1883, become solely entitled to the residue of the Potter Grange Estate adjoining the fifty-seven acres purchased by the North Eastern Company, he had, as such adjoining owner, acquired, under the Lands Clauses Consolidation Act, 1845, certain rights to the lands not required or used by the company as being superfluous lands; and he

alleged that he had, with respect to such rights, opposed the passing of the Act of 1883, in consequence of which opposition the proviso in s. 40 was specially inserted for his protection. He further contended that the seven acres purchased by the Lancashire and Yorkshire Company were at the time of the purchase superfluous lands of the North Eastern Company, and ought, therefore, under s. 128 of the Lands Clauses Act, to have been first offered to him, instead of being sold to the Lancashire and Yorkshire Company. He accordingly, in January, 1895, brought this action against the North Eastern Company, claiming a declaration that the lands purchased by that company and not actually used by them were "superfluous lands" within the meaning of the Lands Clauses Act; a declaration that the plaintiff was entitled to the difference between the 2247*l.* 10*s.* received by the defendants as the proceeds of sale of the seven acres and the fair value thereof at the time of such sale as between the plaintiff and the defendants, or alternatively that the plaintiff was entitled to damages in respect of such sale; and payment of the amount of such difference, with interest from the date of sale.

The defendants denied that the lands purchased by them and not actually used for their Hull and Doncaster line were superfluous lands, and stated in their defence that the whole of the fifty-seven acres purchased by them were situate close to and partly in the town of Goole, and in close proximity to the docks and to the junction of the defendants' line of railway with the Lancashire and Yorkshire Railway: that as the traffic on the defendants' line had ever since 1871 been and still was increasing the whole of the fifty-seven acres were required for the defendants' undertaking and works, and that no part thereof had ever ceased to be so required or become superfluous land: that the seven acres compulsorily purchased by the Lancashire and Yorkshire Company was not superfluous land, but was acquired by that company to meet the necessities of their joint traffic with the defendants in connection with the said junction, and would, if not so utilized, have been required by the defendants for sidings and works in respect of such joint traffic. To the plaintiff's claim for the difference between the amount of

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purchase-money paid by the Lancashire and Yorkshire Company for the seven acres and the fair value of such land at the time of sale, the defendants pleaded the Statute of Limitations; and they further alleged that the price so paid was barely, if not actually below, the value of such land, and that the difference claimed by the plaintiff did not exist in fact.

The action was tried before Kekewich J., on July 5 and 6, 1895. At the trial the defendants' general manager at Goole stated, in evidence, that if the Lancashire and Yorkshire Company had not constructed the junction sidings and works referred to in the Act of 1883, the defendants would have been obliged to do so themselves in order to meet the exigencies of their traffic. Accordingly it was contended, on behalf of the defendants, that the seven acres on which the sidings and works had been constructed never were in fact superfluous lands. Kekewich J., however, held that there was no evidence that the seven acres were required by the Lancashire and Yorkshire Company for the joint purposes of themselves and the defendants, but that, on the contrary, they were required for the purposes of the Lancashire and Yorkshire Company's undertaking alone; and he said he felt himself bound by the decision of the Court of Appeal in *Lord Carington* v. *Wycombe Ry. Co.* (1), rather than by that of Manisty J. in *Hobbs* v. *Midland Ry. Co.* (2), to hold that the fact of the North Eastern Company having entered into an agreement for the sale of the seven acres to the Lancashire and Yorkshire Company was of itself an acknowledgment by the North Eastern Company that the lands were not required for the purposes of their undertaking, and were therefore superfluous lands within the meaning of the Act.

His Lordship accordingly gave judgment declaring that the plaintiff was entitled to be paid the difference between the sum of 2247*l.* 10*s.*, being the price paid by the Lancashire and Yorkshire Company in 1884 for the seven acres sold to them by the defendants, and the fair value of the seven acres at the time of such sale as between the plaintiff and the defendants, together with interest on such difference at 4 per cent. per annum from the date of the receipt of the said sum; also directing (amongst

(1) L. R. 3 Ch. 377. (2) 20 Ch. D. 418.

other things) an inquiry as to what was such fair value, and what was the amount payable to the plaintiff under the above declaration.

G. I. F. C.

The defendants appealed.

The appeal was heard on December 6, 1895.

Renshaw, *Q.C.*, and *W. Baker* (*Ernest Moon* with them), for the defendants. The view taken by the learned judge, that because the defendants sold this land to the Lancashire and Yorkshire Railway Company it was superfluous land, was wrong, because he left out of consideration the fact that the land was taken by the purchasing company under their compulsory powers. The defendants sold, not as owners of superfluous land, but under the compulsion of s. 40 of the Act of 1883; and the evidence establishes that at the time of the sale the land was in fact required by the defendants for their undertaking. The plaintiff's claim is based upon the right of pre-emption conferred by s. 128 of the Lands Clauses Act, where a sale of superfluous lands is contemplated, but that section has no application to the case of a compulsory sale. *Lord Carington* v. *Wycombe Ry. Co.* (1), upon which the learned judge based his decision, is distinguishable on two grounds: (1.) that the land was not acquired by the company bonâ fide for the purposes of their undertaking; (2.) that the company, by reciting in the conveyance that the land was superfluous, were estopped from maintaining the contrary. *Hobbs* v. *Midland Ry. Co.* (2) is in point. There it was held that the mere fact that the railway company sold land to another company with whom they had a mutual working agreement was not conclusive to shew that the land was superfluous. Prior to the decision of Kekewich J. in this case that case has never been questioned, and we submit that it is good law. This is an a fortiori case, because here the sale was compulsory. It is a common practice for the Legislature to grant powers to one railway company to purchase lands belonging to another; and it would be a strange thing if in every such case the intending vendors were bound to offer the lands in the first instance to the owner of the land

(1) L. R. 3 Ch. 377. (2) 20 Ch. D. 418.

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from which the same were severed, seeing that it would frequently involve a long and complicated inquiry to discover who was the person entitled to such right of pre-emption.

The proviso in s. 40 does not touch this case, because at the date of the sale the plaintiff had no rights over this land. The effect of it seems to be to give the plaintiff the same rights against the Lancashire and Yorkshire Railway Company as he would have had against the defendants if the land had not been sold under the powers of the Act.

Assuming this land to have become superfluous by reason of the compulsory sale, the plaintiff's remedy is barred by the Statute of Limitations.

Warrington, Q.C., and *E. Ford*, for the plaintiff. The Legislature by passing the Act of 1883 dedicated this land to a purpose which was not a purpose of the defendants' undertaking; and if this land had been required by the defendants for the purposes of their undertaking, it is inconceivable that Parliament would have taken it away. The inference, therefore, is that this land was not required by the defendants, and was superfluous land. In *Lord Beauchamp* v. *Great Western Ry. Co.* (1), Lord Hatherley says that the most conclusive way in which a company can shew that land is not required for the purposes of their undertaking is by selling it.

With regard to *Hobbs* v. *Midland Ry. Co.* (2), it is not necessary to say that that case was wrongly decided, because it is distinguishable from the present case by the fact that the Midland Company sold under stipulations made for the benefit of their undertaking.

Assuming this land to be superfluous, then it was the right of the plaintiff, if the sale to the Lancashire and Yorkshire Railway Company took place, to insist that he should be the person to carry it out. The defendants were bound to offer the land to the plaintiff, who would then have been entitled to buy back the land at its fair value, and to sell it to the Lancashire and Yorkshire Railway Company at the enhanced value incidental to a compulsory sale. Such being the right of the plaintiff under the Lands Clauses Act, the proviso in s. 40 of the Act of

(1) L. R. 3 Ch. 745, 751. (2) 20 Ch. D. 418.

1883 enables him to follow the proceeds of the sale in the hands of the defendants subject to his paying them the fair value of the land. Subject thereto the defendants are trustees of the proceeds for the plaintiff, and, the money being in their hands, they cannot bring themselves within any of the Statutes of Limitations.

LINDLEY L.J. The point is a very short one, and it appears to me free from difficulty. Prior to the Act of Parliament of 1883 the plaintiff Mr. Dunhill, or his predecessors in title, sold some land to the North Eastern Railway Company for the purpose of their railway. The land so sold consisted of fifty-seven acres, which included a piece of seven acres, the subject-matter of the present proceedings. In the year 1883 the North Eastern Railway Company were the owners in every sense of the word of these seven acres. The evidence shews that in 1883 they were not superfluous land, that is to say, that they were not within ss. 127 and 128 of the Lands Clauses Act: no one could then say that these seven acres were not required for the purposes of the North Eastern Railway. When the Lancashire and Yorkshire Railway Act of 1883 was passed, Mr. Dunhill had no right and no interest in these lands except in the event of their becoming superfluous lands or lands not required for the purposes of the North Eastern Railway, in which event he would acquire a right of pre-emption under the Lands Clauses Act. By s. 40 of the Act of 1883 the Lancashire and Yorkshire Railway Company were authorized to purchase and take by compulsion or agreement certain lands in Goole which included these seven acres. The section also contained a proviso to which I will allude hereafter. What was the position of affairs, then? The plaintiff contends, and Kekewich J. has held, that by that very circumstance these lands must be treated as no longer wanted for the purpose of the North Eastern Railway Company. That appears to me to be an inference which it is impossible to draw from any language contained in the Act of Parliament. The Legislature does not say, "You do not want the lands." It says, "Whether you want them or not, the Lancashire and Yorkshire Railway

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Company is entitled to have them." It does not say to a private owner, "You do not want your land; the railway company does; the railway company shall have it." What the Act says to a private owner is, "However much you may want your land, reasons of public policy and convenience justify us in compelling you to part with it for public purposes." That is what Parliament has said to the North Eastern Railway Company. Whether the North Eastern Railway Company opposed the Bill or not I do not know; but here is this Act of Parliament which clearly enables the Lancashire and Yorkshire Railway Company to take these lands, however much the North Eastern Railway Company may want them. In these circumstances, how are we to infer as a matter of fact or to hold as a matter of law that the mere fact of Parliament forcing the North Eastern Railway Company to give up this piece of land to the Lancashire and Yorkshire Railway Company is equivalent to saying, "You, the North Eastern Railway Company, do not want it, and because you do not want it, you shall part with it"? Such a construction seems to me to be impossible. But that really goes to the root of the judgment of Kekewich J. I cannot help thinking that that learned judge rather confused his mind by considering other cases. Certainly the case of *Lord Carington* v. *Wycombe Ry. Co.* (1) does not touch this. In that case the land was obviously land not required for the purposes of the railway company, and in that case there was no such element as we have to deal with here, that is to say, an Act of Parliament compelling the railway company to part with the land. With regard to the case of *Hobbs* v. *Midland Ry. Co.* (2), I think the view taken by Manisty J. was right—that if a railway company sells land before the prescribed period has expired, primâ facie that leads to the inference that the company does not require the land for the purpose of the railway; but the sale does not relieve the Court from the necessity of inquiring whether the land is in fact required or not. If the Court finds, as Manisty J. found in *Hobbs* v. *Midland Ry. Co.* (2), that the land is required, and has nevertheless been attempted to be sold by an ultra vires

(1) L. R. 3 Ch. 377. (2) 20 Ch. D. 418.

proceeding, the Court ought not to infer from the sale itself what is contrary to the fact, that the land is superfluous land. Therefore that decision seems to me perfectly right, and the principle upon which the decision proceeded also seems perfectly right. Kekewich J. thought that the case of *Lord Carington* v. *Wycombe Ry. Co.* (1) was opposed to the case of *Hobbs* v. *Midland Ry. Co.* (2), but in my opinion it is clearly distinguishable from that case and also from this case. Now, if that view is well founded—and I have not the slightest doubt about it myself—what becomes of this litigation? The result is that the plaintiff is entirely in the wrong from beginning to end.

I will say a few words about the proviso in s. 40. [The Lord Justice read the proviso and continued:—] I have pointed out what, in my opinion, was the position of Mr. Dunhill when this Act of Parliament was passed; and although the language is not so explicit as it might be, it appears to me that, if the seven acres had become superfluous lands in the hands of the Lancashire and Yorkshire Railway Company, Mr. Dunhill might have had the benefit of this proviso, and might in that event have been able to say to them, "Treat me as the person who sold the lands to you, and give me the right of pre-emption under the Lands Clauses Act which I should have had against the North Eastern Railway Company if they had not required them." In my opinion that is the true effect of that proviso, and it has no other operation; but that may be an important operation. It may not be important to Mr. Dunhill at present, but if these lands should become superfluous lands in the hands of the Lancashire and Yorkshire Railway Company the proviso might be of use to him. But to ask us to hold that this proviso gives him a right to say, contrary to the fact, that these lands are to be treated as superfluous lands in the hands of the North Eastern Railway Company is to ask us to say that which is not warranted either by the language of the section or by the real truth. I think that this appeal must be allowed, and that judgment must be given for the defendants with costs both here and below.

(1) L. R. 3 Ch. 377. (2) 20 Ch. D. 418.

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A. L. SMITH L.J., after discussing the evidence on the question whether, at the date of the sale in 1883, the land in question was or was not in fact superfluous land, and holding that it was not, continued as follows:—The question arises, Did this sale by the North Eastern Railway Company within the period prescribed by statute for the sale of their superfluous lands bring this case within ss. 127, 128, and 129 of the Lands Clauses Act? In my judgment it did nothing of the sort. Those sections apply to voluntary sales by a railway company, and not to a case where the Legislature has thought fit to intervene and compulsorily to take lands out of the hands of a railway company and hand it over to another company. The object of these sections is well known. In the year 1845 it was contemplated that, unless railway companies were compelled to sell their superfluous lands, they might, by holding land in excess of what was requisite and necessary for the purpose of their undertaking, become large landowners with large powers, and it was to prevent this that those sections were enacted. Upon reading these sections carefully, it is plain to me that their application is confined to the case of voluntary sales.

Now what has happened? In 1883 these seven acres, which had not become superfluous lands of the North Eastern Railway Company within the meaning of the Lands Clauses Act, were wanted by the Lancashire and Yorkshire Railway Company for the purposes of their undertaking. In these circumstances the Legislature intervened, and enacted that the Lancashire and Yorkshire Railway Company were entitled to purchase by compulsion these seven acres from the North Eastern Railway Company. Now what is the effect of this? It is said that this act of the Legislature in compelling the North Eastern Railway Company to sell these lands to the Lancashire and Yorkshire Railway Company constituted them superfluous lands, although they were not de facto superfluous lands, in the hands of the North Eastern Railway Company, and that therefore the plaintiff had a right of pre-emption, and that the lands ought to have been offered to him before the Lancashire and Yorkshire Railway Company were entitled to purchase them. I cannot see how this can be. In my judgment a compulsory

purchase by a company under an Act of Parliament cannot be held to be any evidence that lands which are not de facto superfluous at the time become superfluous by reason of the exercise of the Legislative power empowering another company to purchase the lands. Kekewich J. has erred in trying to apply either of the cases of *Hobbs* v. *Midland Ry. Co.* (1) and *Lord Carington* v. *Wycombe Ry. Co.* (2) to the present, for they really have nothing to do with this case. There was no taking by compulsion by the act of the Legislature in either of those cases; in each there was a voluntary sale, and I think Manisty J. was quite right in holding in *Hobbs* v. *Midland Ry. Co.* (1) that a voluntary sale by a railway company of lands which were in the company's possession prior to the expiration of the prescribed period was a fact from which you might infer that the lands were superfluous lands—for if they were not superfluous lands, what right had the company to sell the lands at all? In the case of *Lord Carington* v. *Wycombe Ry. Co.* (2) the railway company had bought lands in the first instance, not for the purpose of their own undertaking, but for the purpose of selling them immediately afterwards at a profit to another purchaser, and this was set aside; as in the case of *Hobbs* v. *Midland Ry. Co.* (1), Manisty J. set aside the conveyance, and relegated the parties to their original rights. It seems to me that neither of those cases touches the point which we have to decide here, namely, whether the compulsory power of purchase given by the Legislature by the Act of 1883 to the Lancashire and Yorkshire Railway Company is any evidence of a conversion into superfluous lands of lands which were not then de facto superfluous lands in the hands of the North Eastern Railway Company. In my opinion it constitutes no such evidence at all.

With regard to the proviso. I should like to point out that when this Act of Parliament of 1883 was passed the plaintiff had as against the North Eastern Railway Company no right in respect of these lands which could be preserved to him, for the best of all reasons they were not at that time nor, as it is now proved, ever would have been superfluous lands in the hands of the North Eastern Railway Company to which the

(1) 20 Ch. D. 418. (2) L. R. 3 Ch. 377.

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plaintiff could claim any right at all. It is true that, as these lands were transferred by compulsion to the Lancashire and Yorkshire Railway Company, it might be possible that they should become superfluous lands in the hands of the Lancashire and Yorkshire Railway Company, and that might have been the idea of the Legislature in inserting this proviso in favour of the plaintiff; but in my judgment that proviso in no way alters this case or converts into superfluous lands lands which were not de facto superfluous. For these reasons I am of opinion that the appeal must be allowed.

RIGBY L.J. In this case the North Eastern Railway Company have purchased lands from the predecessors in title of the present plaintiff, or under such circumstances that the plaintiff now stands in the position of the vendors. The lands so purchased were a very considerable tract of land containing altogether more than fifty acres. Of course the Legislature would not have given these powers to purchase this land but for special circumstances. What these special circumstances were is apparent if one looks at the map. This piece of land is very close to the town of Goole; and the North Eastern Railway Company must have persuaded the Legislature that there was a probability of their wanting the land for the purpose of their railway, or else they never would have been allowed to buy it. Then in 1883 was passed an Act of Parliament which by s. 40 empowered the Lancashire and Yorkshire Railway Company to take compulsorily a portion of this land containing about seven acres, which is now the only part of the land which we have to consider. The question arises first of all, independently of the proviso, what does that mean? As pointed out by my brother Lindley, it does not prove that the Legislature thought that this was land not required for the purpose of the North Eastern Railway Company; it does prove that the Legislature thought that it might be better for public purposes to place it in the hands of the Lancashire and Yorkshire Railway Company. That, according to my mind, is all that it proves. Now, what has happened? In 1883 it is plain that the period had not arrived when the North Eastern

Railway Company were bound to say definitely whether the lands in question were superfluous or not, and the time was ultimately extended to the year 1894. At any rate in 1883 it was not incumbent on the North Eastern Railway Company definitely to make up their minds upon the question. In other words, the plaintiff as representing the vendors, had no existing right whatsoever with regard to the land, although ultimately he might become entitled to the land in default of the company dealing with it if it really was land not required for the purposes of their railway.

Let us follow out the consequences of the sale. Before notice to treat was given to them, the railway company were under no obligation to offer it to the plaintiff. When notice to treat was given, that formed a statutory contract by which they were bound; they were no longer in equity the owners of the land at all. A conveyance had to take place, and that was all. Why should a man who has no equitable interest in land,—land which he is selling in obedience to a statute—go through the form—because it must be a form only—of saying to another person, "I will sell you the land"? He had no power to do so. He could not have done it. I think that conclusively shews that the sections which have been referred to under the Lands Clauses Consolidation Act, namely, ss. 127 and 128, cannot have intended to deal with such a case at all. It is idle for an Act of Parliament to say, "You, who, by reason of the notice to treat which has been legally served upon you, have no longer any equitable interest in the land, shall sell it." It cannot mean that.

Then look at the proviso. The proviso says "that nothing in this section"—that is, s. 40—"shall alter or affect"—I take out the words which are important for this purpose—"any interest or advantage of William Henry Carter Dunhill"—that is, the plaintiff. As I have said, all the right he had was a contingent right, a right arising at a future time in case it turned out that the lands were lands which were not required for the purpose of the North Eastern Railway. Now the evidence as to that shews conclusively what would have been the position of the land but for this compulsory sale, namely,

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that at the expiration of the prescribed time in 1894 it would have been required for the purpose of the North Eastern Railway. Therefore Mr. Dunhill's rights were nothing at all. I cannot understand how in these circumstances the cases referred to have any application. I can understand, when land is sold by a company and the conveyance recites that the lands are superfluous lands, which is equivalent to saying they are not required for the purposes of the undertaking, that as between the railway company and the adjoining owners the right of pre-emption accrues. The case of *Lord Carington* v. *Wycombe Ry. Co.* (1) would be sufficient authority for that. I agree with what Manisty J. says in *Hobbs* v. *Midland Ry. Co.* (2), that the sale is not of itself conclusive evidence, and that it does not operate by way of an estoppel so as to make a railway company say what they never intended to say, that the land was not required for the purpose of their undertaking. In my judgment there is nothing in either of these authorities to lead to the conclusion that a sale of this kind under compulsory powers to buy given to another railway company has any effect in shewing that the lands were not required, and would not have been required, before the end of the term for the purpose of the railway company.

Solicitors: *Williamson, Hill & Co., for A. Kaye Butterworth, York; Beyfus & Beyfus.*

(1) L. R. 3 Ch. 377. (2) 20 Ch. D. 418.

H. C. J.

EYRE *v.* WYNN-MACKENZIE.

C. A.
1895
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[1892 E. 1560.]

Practice—Extension of Time for Appealing—Alteration of Law since Judgment—Costs of Solicitor-Mortgagee—Mortgagees Legal Costs Act, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.

A solicitor-mortgagee who had, by a judgment given before the passing of the Mortgagees Legal Costs Act, 1895, been held not to be entitled to charge profit costs against his mortgagor, applied after the passing of the Act for an extension of the time for appealing against the judgment, on the ground that s. 3 of the Act is retrospective in its operation :—

Held, that the Act was not intended to affect judgments given before it was passed, and that there was no ground for extending the time.

Motion by the plaintiff (who was a solicitor) that, notwithstanding that the time limited by the Rules of the Supreme Court had expired, he might be at liberty to appeal from so much of the judgment in the action, dated November 28, 1893, as declared that the plaintiff was not entitled to charge the defendant, or Charlotte Wynn-Mackenzie, his late wife (whose administrator the defendant was), or her estate, with any profit costs of the plaintiff for the preparation or execution of an indenture of December 24, 1873, or certain other indentures in the judgment respectively mentioned, or for any work done in connection with the securities thereby created, or the moneys thereby secured respectively, or for the receipt and application of the income in the judgment mentioned, or for the work done as such agent as in the judgment mentioned.

By the writ in the action the plaintiff claimed an account of all sums of money advanced or paid by the plaintiff to or on account of, or which had become owing to him in respect of, bills of costs, or owing by the defendant and his late wife, or either of them, with interest thereon, and covenanted by the defendant to be paid by him in the several indentures of mortgage in the writ mentioned, and payment by the defendant of the amount which should be found due upon taking the account.

The indenture of December 24, 1873, was a transfer to the

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plaintiff of a mortgage which had been created by Mr. and Mrs. Wynn-Mackenzie in favour of Sir Charles McGrigor, with a further charge in favour of the plaintiff. The other indentures were deeds of further charge in favour of the plaintiff.

On November 28, 1893, the judgment in the action was given (1), containing the declaration above mentioned, which was inserted because the plaintiff had acted as the solicitor of Mr. and Mrs. Wynn-Mackenzie in the preparation of the various mortgage securities. Kekewich J. held that the plaintiff was not entitled to charge the mortgagors with profit costs, notwithstanding that the mortgage deed contained a covenant by the mortgagors to pay, not only the mortgage debt with interest, but also "every other sum of money which may hereafter be advanced or paid by the mortgagee to or on account of or become owing to the mortgagee" by the mortgagors.

The plaintiff did not appeal within the time limited by the Rules of the Supreme Court for so doing.

On July 6, 1895, the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25) (2), was passed.

De Castro, for the plaintiff. There is good ground for extending the time for appealing. Sect. 3 is retrospective in its operation. If the action had been commenced after the passing of the Act, or if it had been commenced before but had not been tried till after, the plaintiff would have been entitled to charge these profit costs. The judgment has been drawn

(1) [1894] 1 Ch. 218.

(2) By s. 3, "(1.) Any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration.

"(2.) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act."

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up, but no proceedings have been yet taken under it. Consequently no injustice will be done to the defendants by enlarging the time for appealing. And it is reasonable that the plaintiff should have the benefit of the altered law.

C. Gurdon, for the defendants, was not called upon.

LINDLEY L.J. If this application is to be regarded as an appeal on the merits, it is impossible for us to say that the judgment was wrong as the law stood at the time when it was given. It is obvious that the Act was not intended to interfere with judgments which had already been given by the Court. If we give leave to appeal in this case, we should be reopening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.

A. L. SMITH L.J. and RIGBY L.J. concurred.

Solicitors: *G. L. P. Eyre & Co.; A. H. Burns.*

W. L. C.

C. A. 1895 Dec. 18.

In re HARVEY. HARVEY *v.* HOBDAY.

[1894 H. 3861.]

Tenant for Life and Remainderman—Payment of Charge on Inheritance—Presumption of Intention to keep alive Charge—Relation of Parent and Child.

The presumption that a tenant for life who pays off a charge upon the inheritance intends to keep the charge alive for his own benefit is not rebutted by the mere fact that the relation of parent and child subsists between the tenant for life and the remainderman.

APPEAL by the plaintiff against the refusal of Kekewich J. to vary the chief clerk's certificate.

On November 15, 1894, a summons was taken out by the plaintiff, who was the executor of Charlotte Emily Harvey, the widow of Charles Bloomfield Harvey, who died on October 7, 1868, to determine whether the plaintiff, as executor of Mrs. Harvey, who was tenant for life under her husband's will, was

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entitled to be paid by the trustees of his will out of the corpus of his estate an amount which had been applied by the trustees, out of her income as tenant for life, in paying off a mortgage upon the inheritance.

The defendants to the summons were the trustees of the testator's will and one of the residuary legatees.

C. B. Harvey, by his will, dated October 3, 1868, after directing payment of his debts and funeral and testamentary expenses, and making a bequest to his wife, gave, devised and bequeathed to his executors all other property of which he might die possessed, real and personal, upon trust to be disposed of by them in the best and most profitable manner, and at a time most suitable (except the pair of houses in Western Road, Romford, which should not be sold during the widowhood of his wife or until her second marriage), the proceeds of such sale to be applied in paying off his existing mortgage, with interest thereon, and the remainder (if any) to be invested in the names of his executors upon trust that the interest arising therefrom, together with the rents or profits arising from the aforesaid houses, should as they became due be paid unto his said wife during her life or widowhood; and after her decease or second marriage, whichever should first happen, he requested that his executors would divide his property as equally as possible among his children by his said wife, or such of them as might be then surviving.

The testator left his wife and five children surviving him.

The two houses mentioned in his will were at the time of his death subject to a mortgage to a building society, the sum secured by which was under the rules of the society to be repaid in monthly instalments consisting of principal and interest. The trustees applied the rents of one of the houses in making the monthly payments to the building society, and by means of those rents, and of a further sum provided out of the testator's estate, the mortgage debt was finally paid off by June, 1882.

The widow did not marry again, and she died on March 18, 1891.

In May, 1893, the two houses were sold for 1225*l.*, and out of this amount the plaintiff claimed to be paid so much of the

amount of the rents which had been paid to the building society as represented capital.

An inquiry was directed what (if anything) was due to the plaintiff as executor of the widow in respect of money expended out of the widow's income as tenant for life under the will in paying off incumbrances on the houses.

The chief clerk by his certificate found that nothing was due to the plaintiff; and Kekewich J. refused the plaintiff's application to vary the certificate.

The plaintiff appealed.

Warrington, *Q.C.*, and *Curtis Price*, for the plaintiff. The legal presumption is that a tenant for life who pays off a mortgage upon the inheritance intends to keep the charge alive for his own benefit.

[LINDLEY L.J. Does that presumption apply as between parent and child?]

No such distinction is suggested in any of the cases which have been decided. In fact, many of the cases have arisen between parent and child: *Burrell* v. *Earl of Egremont* (1); *Morley* v. *Morley*. (2) The onus is upon those who seek to rebut the presumption.

Renshaw, *Q.C.*, and *Marcy*, for the defendants. There is no doubt as to the law. But, in order to determine what the true presumption is, you must look at the facts of the particular case. The proper conclusion from the evidence in the present case is, that the mother authorized the trustees to pay off the mortgage debt by means of the rents with the intention that her children should have the benefit of it. The presumption that she made the payments for the benefit of her children is as strong as the presumption that she intended to keep alive the charge: *Jones* v. *Morgan*. (3)

LINDLEY L.J. I think it is established by the evidence that as a matter of fact (whatever the explanation of it may be) the rents of one of the two mortgaged houses were applied

(1) 7 Beav. 205. (2) 5 D. M. & G. 610.
(3) 1 Bro. C. C. 206.

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by the trustees of the will in paying the instalments which became due under the mortgage to the building society.

Then, as regards the law, the ordinary legal presumption is that a tenant for life who pays off an incumbrance upon the inheritance does so for his own benefit, and I think Mr. Warrington is right in saying that the onus is upon the defendants to prove that it does not apply. The fact that the tenant for life and the remaindermen stood in the relation of parent and child is no doubt a material circumstance; and if there were anything else to rebut the presumption that fact would be of importance. But I do not think any of the authorities goes the length of saying that the existence of that relationship standing alone is sufficient. We must therefore look at all the facts and circumstances, and see what else there is to rebut the presumption. [His Lordship referred to the evidence.] The tenant for life had no option about paying off the mortgage debt; indeed, it was rather to her interest that it should be paid off. And it is an important fact that no other property but these two houses was subject to the mortgage. The fact that some arrangement was made that the rents of one of the houses should be applied in paying off the mortgage debt does not throw any light upon the question whether the tenant for life intended that it should be paid off for the benefit of her children. Taking all the facts together, the case comes to this: on the one side is the legal presumption which I have mentioned, and on the other side there is nothing to rebut it but the relationship between the parties; and that, as I have already said, is not, in my opinion, sufficient to rebut the presumption. In my opinion, the appeal must be allowed.

A. L. SMITH L.J. I am satisfied by the evidence that the rents of the one house were applied in paying off the building society's mortgage. What, then, is the presumption of law when such a payment is made by a tenant for life? I cannot do better than read what was said by Lord Langdale in *Burrell* v. *Earl of Egremont* (1): "A simple payment of the charge, without more, is sufficient to establish the right of the tenant for

(1) 7 Beav. 232.

life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate." The burden of proof, therefore, is upon the respondents. Have they discharged it? It is said on their behalf that the tenant for life is a mother and the remaindermen are her children. It seems to me that, according to the authorities which have been cited, that of itself is not sufficient to rebut the presumption, and there is nothing else to rebut it. In my opinion, therefore, the presumption has not been rebutted, and the decision of my brother Kekewich was erroneous.

A. L. Smith L.J.

RIGBY L.J. I have arrived at the same conclusion. The case is in some respects one of importance. Probably it was never explained to the tenant for life that, if she paid off the mortgage debt, she would be entitled to a charge upon the inheritance to the extent of the principal. Her voluntary giving up of that which the law allowed her to receive is not so strong an indication of intention as the payment of a lump sum would have been. And, if in the ordinary case of payment of a mortgage debt by a tenant for life the legal presumption arises, I think that when the debt was payable by instalments, each consisting of principal and interest, and probably all that the tenant for life knew was that, if the instalments were not punctually paid, the building society would come down on the property, it would require more than a mere suggestion of some arrangement that she should pay off the mortgage debt for the benefit of her children, to rebut the presumption that she did not intend to relinquish her right to a charge upon the property. The appeal must be allowed.

Solicitors: *A. H. Hunt & Co.; Walker & Battiscombe.*

W. L. C.

C. A. 1895 *Nov.* 18, 19.

JOHN HARPER & CO., LIMITED *v.* WRIGHT AND BUTLER LAMP MANUFACTURING COMPANY, LIMITED.

[1894 J. 385.]

Copyright — Design — Infringement — Pattern, Shape and Configuration— Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 60— *Designs Rules*, 1883, *r.* 9.

The plaintiffs registered a design for an upright hexagonal metal stove, the sides of which had the representation in metal work of a church window, of a particular style of architecture, with tracery above and below, the design being registered as applicable to pattern, shape and configuration. The defendants produced a hexagonal upright stove with a design of a church window, of a different style of architecture, with different tracery, but the general appearance of the stove was very similar to that of the plaintiffs' stove:—

Held, by the Court of Appeal, reversing the decision of Kekewich J., that the defendants' stove was an obvious imitation of the plaintiffs' stove and an infringement of his copyright.

Hecla Foundry Co. v. *Walker, Hunter & Co.* (14 App. Cas. 550) applied.

Where a design is registered as applicable to pattern, shape and configuration, the registration applies to the design as a whole, and it is protected although in one of those particulars it may not be novel.

The owner of a registered design is not deprived of his right to protection merely because he places on the articles which he sells, besides the registered number of his design, other numbers which ought not to be there.

Where a design is registered, and before the expiration of the term of protection the same design with an unimportant variation is registered, the original design may be copied as soon as the original term of protection expires, provided the variation is not copied.

APPEAL from a decision of Kekewich J. (1)

The plaintiffs were proprietors of two registered designs for an oil stove sold by them under the name of the "Cathedral Stove." The first design was registered on April 25, 1891, and consisted of an upright hexagonal metal stove, the sides of which bore the representation in metal work of a Gothic church window with tracery above and below, and a lid or cover terminating in a metal knob, the stove being intended to contain an oil lamp for heating purposes. The design was registered as applicable to pattern, shape and configuration.

(1) [1895] 2 Ch. 593.

The second design was registered on June 20, 1892, and was for an improvement on the previous design, the improvement consisting of an enlarged base to the stove enabling it to contain a larger lamp.

The defendants produced and sold upright oil stoves of hexagonal shape to which they applied a design of a Gothic church window with tracery above and below, but the window in their stove was of a different character and style of architecture from that in the plaintiffs' stove, and the tracery above and below the window was also different. The defendants' stove had an enlarged base, but of a somewhat different pattern from the base of the plaintiffs' improved stove.

Altogether there was a considerable resemblance between the plaintiffs' and the defendants' stoves, and it appeared in evidence that the design for the defendants' stove had been made for them by a person who was shewn one of the plaintiffs' stoves and was instructed to make "an original design for a similar article."

The defendants in their defence denied infringement of the plaintiffs' registered designs, and they also alleged that the registration of the defendants' design on April 25, 1891, was invalid from want of novelty, and that the improved design registered in June, 1892, was merely a modification of the previous design, only differing from it in the base of the stove, and was also invalid from want of novelty. They also objected that the plaintiffs had registered two other designs for the handles and covers of the stoves, and that they had marked upon their stoves the numbers of these other designs as well as the number of the registered design for the stove, thereby misleading the public.

At the trial before Kekewich J., his Lordship held that although the defendants had adopted the idea of the plaintiffs, namely, the church window, they had not copied their design but had made a different one for themselves, and had not infringed the plaintiffs' copyright. He therefore dismissed the action without hearing the defendants' evidence as to the validity of the plaintiffs' registration. From this judgment the plaintiffs appealed.

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JOHN HARPER & Co., LIMITED v. WRIGHT AND BUTLER, &c., LIMITED.

Bousfield, Q.C., Warrington, Q.C., and *J. H. Fisher*, for the appellants. The design of the defendants is a fraudulent and obvious imitation of the plaintiffs' design within the meaning of s. 58 of the Patents, Designs and Trade Marks Act, 1883. The question must be judged of by the eye, and it is clear that not only the idea but the form and configuration of the plaintiffs' stoves have been imitated: *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (1); *Grafton* v. *Watson.* (2) The conduct of the defendants in furnishing their designer with one of the plaintiffs' stoves, with instructions to make an original design for a similar article, shews that the imitation was fraudulent.

Marten, Q.C., Moulton, Q.C., and *W. N. Lawson*, for the respondents. We were not called upon to argue in the Court below, and consequently our case was not gone into. The idea of a church or cathedral window as a pattern for the sides of a stove did not originate with the plaintiffs but with the defendants, and we have catalogues issued in 1887 which comprise stoves with similar designs. The claim of the plaintiffs (even if good) must be confined to details, and the details are essentially different, for the windows are not the same in design and belong to entirely different periods of architecture. The plaintiffs have registered their design as applicable to pattern, shape and configuration (3), and if there was no novelty in respect of any one of these particulars the registration is void. We say that in shape and configuration there was no novelty. Polygonal stoves were well known before. With respect to the plaintiffs' second design, namely, the design for a stove with an enlarged base, that design can only be good so far as it applies to the base, the rest of the design being covered by the previous registration; and the defendants have not infringed the design for the base, their base being of an entirely

(1) 14 App. Cas. 550; 6 Rep. Pat. Cas. 554.

(2) 51 L. T. (N.S.) 141.

(3) Rule 9 of the Designs Rules, 1883, is as follows: "An application for the registration of a design shall be accompanied by a sketch or drawing, or by three exactly similar drawings, photographs, or tracings of the design, or by three specimens of the design, and shall, in describing the nature of the design, state whether it is applicable for the pattern or for the shape or configuration of the design, and the means by which it is applicable."

different pattern. If an inventor could register a slight modification of an old design as a new design he would be able to prolong his copyright indefinitely. The plaintiffs have also deceived the public by placing on their stoves the numbers, not only of their designs for the stove, but also of the handles and cover, so that the public cannot tell to what the numbers refer. They are therefore not entitled to the interference of the Court.

LORD HERSCHELL. In this case the plaintiffs bring an action against the defendants alleging that they have infringed two designs which the plaintiffs registered. I will deal with the two designs separately. The first design was registered in April, 1891. The registration was accompanied by a photograph shewing a stove, such as the plaintiffs have since sold, and which they allege the defendants have copied. I leave till a later stage the questions raised with regard to the form of the registration beyond saying this, that whatever else is covered by that registration it appears to me that the design is covered, that is to say, the design as a whole as shewn by that photograph.

The defendants, in the season subsequent to the plaintiffs bringing this stove before the public, brought out a stove of which the plaintiffs complain as an infringement of that first registered design. At the trial the learned judge, at the close of the plaintiffs' case, came to the conclusion that there was no infringement, and gave judgment for the defendants. The defendants' case, therefore, was not gone into; but inasmuch as it seemed to be the interest of all parties, if we thought on hearing the plaintiffs' case that there was an infringement, that the whole case should be disposed of here, we permitted the defendants' counsel to state all the facts which he could have proved if the defendants' case had been heard by the learned judge in the court below, and those facts being admitted by the learned counsel for the plaintiffs, we have now the whole case before us, and therefore we are able to deal with it without sending it down for a new trial.

The learned judge thought that the plaintiffs had not proved an infringement by the defendants of their design. Now how

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is a question of that sort to be tested? That was laid down in the House of Lords in the case of *Hecla Foundry Co.* v. *Walker*, *Hunter & Co.* (1) I will read a passage from the opinion which I expressed to the House of Lords in that case (2): "It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other. I ought, perhaps, to qualify this by saying that as a design to be registered must, by s. 47, be a 'new or original design, not previously published in the United Kingdom,' one may be entitled to take into account the state of knowledge at the time of registration, and in what respects the design was new or original, when considering whether any variations from the registered design which appear in the alleged infringement are substantial or immaterial." Now here the two designs have been placed side by side, the eye has been left to judge, and the impression produced upon all the members of the Court has been this, that the one design is an obvious imitation of the other, that in all their essential features they are alike, and that in those essential features they differ, both of them, from anything that had been previously known. Better proof than that that the one design is an obvious imitation of the other it seems to me it would be impossible to give.

On what ground do the defendants say that the one is not an obvious imitation of the other? They point to the different details, the different parts of the design, and they shew in each part of the design differences of detail. They undoubtedly shew that; but, to my mind, that has no bearing upon the question whether the one is or is not an obvious imitation of the other.

You may produce precisely the same design in all its essential features, though you make differences in all, or almost all, its details. Now what are the essential features of the design? It is always difficult to give reasons in a case of this sort beyond saying, "I look at the two, and the one seems to me an obvious imitation of the other"; but I will endeavour, so far as I can,

(1) 14 App. Cas. 550. (2) 14 App. Cas. 555.

to do so. The feature of the plaintiffs' design was this, that you had supported upon feet, above which was a base sloping upwards, a stove, hexagonal in form, with open iron tracery to a height of about a fourth, or something less than a fourth, of the total height of the stove. Above that you had a Gothic window, and above that again tracery corresponding to that which was below the window. Then you had a projecting cornice with the six sides of the cover sloping upwards to an apex surmounted by a knob with a brass ball at the top. That would be perhaps a tolerably adequate description of the design of the plaintiffs' stove. Now the whole description that I have given would be equally applicable to the defendants' stove, and it would be inapplicable to any form of stove known down to that time. That seems to me to go a long way to shew that the one is an imitation of the other. If any one, having seen the plaintiffs' stove, had described its general features to a tradesman whom he asked to supply him with such a stove, the tradesman, if in possession of one of the defendants' stoves, would have supplied that stove, and it would have been recognised as answering the description of the stove ordered. And yet, when you come to look at the kind of ornamentation, and even to a certain extent in some cases to the form, you can point to obvious differences when the two are placed side by side. For instance the cover of the plaintiffs' is concave, there is a convexity about the cover of the defendants'. But all these differences in detail do not prevent the two designs being essentially the same.

That is the conclusion which I should arrive at, seeing the two designs side by side, and knowing nothing of the history of the case. But what is the evidence? The defendants employ a designer, and after putting him in possession of the plaintiffs' stove, instructions are given to him to make an original design for a similar article. Now what was the meaning of that? In what respect was it to be a similar article? Was it to be a stove? That could not be the meaning of it. There were many stoves. It could not merely mean that it was to be a hexagonal stove, because they could have told him to make a hexagonal stove of a certain height without ever shewing him,

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or calling his attention to, the plaintiffs'. It could not be merely that it was to have some open iron tracery about it, because a hexagonal stove with iron tracery and of a certain height would have been enough. What was the meaning of giving him the plaintiffs' stove and telling him to make a similar article? Why, it was to be similar in its essential features, in that which made it attractive to the public, and in that which made it a good article of commerce, but it was to be original in design—that is to say, although producing a similar article, which would appear to the public to be alike, they were to be able to point to originality in all its details. A clearer direction to a designer to make an obvious imitation it seems to me it would be difficult to find. That is what I understand the instructions to be, and that is what the designer understood the instructions to be. It seems to me that he followed out his instructions extremely well. Therefore we are not here left to the mere judgment of the eye. The history of the case shews that what was intended is what has been produced.

I can entertain no doubt, therefore, that in this case one of these is an obvious imitation of the other. I think that the learned judge in the Court below erred in considering too much the details as essentials of the design; the designs may be the same although the details largely differ. He pointed out that although in each case there was a cathedral window it was a cathedral window of a different order of architecture in the two. No doubt if the whole point of the design had consisted merely in a cathedral window of a particular kind it would have been an answer to say, "I have made a cathedral window of a different kind, therefore my design is not the same as yours." But the design consists of the whole thing, in the proportion of parts, the relation in height of the lower tracery to the window, and of the upper tracery to the window, and in the form of the lid, and all these matters together make the design; and being able to point to a particular part or parts and shew that the differences are manifest does not answer the allegation that the one design is the same as the other. The learned judge said that there was originality in the plaintiffs' idea of putting in a cathedral window, but he said, "They have lost the

benefit of their original idea, but they have lost it through another design which is original, except in so far as the idea of it was borrowed from their design." But if that which was certainly a part at least of the originality of their idea was copied from them, then it is difficult to see how the second can be an equally original design. The truth is that the defendants took all the essential elements of the plaintiffs' design.

The learned counsel for the respondents have contended that even if the conclusion be arrived at that the defendants' design as a whole was an infringement of the plaintiffs', yet the plaintiffs cannot succeed on several grounds. First, it is said that when they registered the design they registered it with a statement of the nature of the design as applicable for pattern, shape and configuration, and that therefore they claimed it for each of those apart from the other, and that if you take the shape there is not sufficient originality about the shape to make it a good or new design, for the shape alone, and therefore the registration, is bad, and the plaintiffs have no rights.

The rule—for it is only a rule—which prescribes that there shall be a statement of the nature of the design accompanying the registration of the design, whether it is applicable for pattern, shape or configuration, makes it essential for the person claiming the design to distinguish between those several things named in the rule, and to shew for which of them he makes his claim. The rule is not a very intelligible one. It would be intelligible if it said that he must declare whether what he claims as novel is for pattern, shape or configuration; but the language used—whether the design is applicable for either one or other of those—certainly, according to its literal interpretation, is not very intelligible. But I do not in the present case intend to decide whether this amounts to a separate claim for the pattern, and for the shape, and for the configuration. It is unnecessary to decide it. It might have been necessary if the infringement had been something different from what it is. Whether the application claims these several parts or not it claims the whole —it claims the design. Whether the insertion of those words which the rules require to be inserted has the effect contended for, I do not know, and I do not propose to say. It is unnecessary

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to say so here. But whatever they mean they do not to my mind prevent the registration being a registration of the design as a whole. What is registered is the design, and there is no difficulty here in determining what the design registered was. That design, I think, has been obviously imitated by the defendants. Therefore I do not say more upon that point.

Then it is said that the plaintiffs are disentitled from recovering because they have misled the public. It is said that they have obtained registration for their handles to the stove, and for a cover to the stove, with a particular pattern of ornamentation of the cover, and they have first of all, on stoves which they have sold, put the registered number of the original design, and also put the registered number of the designs which they registered subsequently, as applicable to particular parts of the stove. It is said that that was misleading, and that the public would not know to what those numbers referred, and if the lid was a new registered lid, then they ought not to have put on the number of the original design, because that was a different design.

Now there is nothing in the Act of Parliament which deprives a person who has registered a design of his right to prevent infringement of it if he puts on articles that he sells registered numbers which ought not to be there. If he sells without putting on the registered number of a design which is within his registration, then no doubt he loses his protection, and it may sometimes be a difficult question to know exactly what numbers he ought to put on, and on what parts of the articles sold, and it is only natural that a person who has registered designs should err on the side of caution, because if he does not put the number there he certainly loses his rights. But there is no clause in the Act of Parliament which deprives him of his rights if he even mistakenly puts numbers on the articles which he sells which have no business there. What might be the case if a person were fraudulently to put numbers on with a view to misleading the public it is unnecessary to say, but it appears to me to be a most hopeless contention to suggest that a person owning registered designs who, in the course of his business, may sell some articles with registered numbers on them which

should not be there, thereby, without any such provision in the Act of Parliament, loses his rights as a registered proprietor. If the Courts were so to hold they would be making the law, they would not be interpreting it. There is no authority for making it the law, and it seems to me it would be a very bad and senseless law, and one tolerably certain in some cases to work great injustice. Therefore I have no disposition to make any such law, even if I felt myself entitled so to do. The whole of these matters were quite unconnected with the defendants or their infringement, and are as a straw seized by a drowning man to save himself if he can, and have about the same value as the straws have for that purpose.

I think that disposes of the whole of the arguments addressed to us upon the first claim in respect of the first infringement. Then what happened was this: the plaintiffs made what they considered an improved design. It had many of the essential features of their first design, but they considered it an improvement. It had an extended base, and was considered by them to be in that respect advantageous. The following year after they had brought out this new design, and had brought their new stove after that design into the market, the defendants brought out an improved "Cathedral Stove" with all the substantial features which existed in the other stove, but with this extended base. Now the argument is that although that stove may be an infringement of the first registered design, because it contains its essential features, yet it is not an infringement of the second registered design, because the second registered design, having regard to the existence of the first, can only be maintained in respect of the details of the modification, and that the details of the modification are not the same in the defendants' as they are in the plaintiffs'. If that could be made out it might well be a good defence. First of all, was there anything to prevent the plaintiffs obtaining protection for the second as a new and original design? I cannot see that there was. It is a new design. It is not a design identical with the design already registered. No doubt it is largely founded upon it; that is not denied; but you may have a new design, though the design is founded upon one which you have previously registered.

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Nothing has been produced which to my mind shews that there was such a common knowledge before the date of the second registration as to prevent that design then registered being a new and original design.

Then have the defendants infringed this design? Now I quite agree that in this part of the case the matter is not so clear as it is on the question of what I will call the first infringement. There is more to be said. But still, applying the test which has been applied in previous cases as the proper test, I own it appears to me that the design complained of—the defendants' design—is an obvious imitation of the plaintiffs'. The defendants might have enlarged the base of a stove without infringing the plaintiffs' design. There is a multitude of ways in which it might be done; but whether they would be appropriate, whether they would be good designs, whether they would make a design which as a whole was effective, would depend upon the way in which this was done. Now the scheme or idea of the plaintiffs' modification which they registered was to provide this enlarged base by a sloping projection immediately under the windows which formed the feature of the stove, making, as Mr. Bousfield has said, something that may be called a window-sill, and then from that point having the sides of the stove again perpendicular, and bringing the line and making the continuity between the line at each corner of the hexagonal figure and a line as found again below this window-sill. It is difficult to describe the thing, but that one may call the general feature of their design.

Now, the same features are found in the defendants' design. There are many ways in which you might make an enlarged base without infringing the plaintiffs' design, but very possibly no other way would have produced the same general and pleasing effect. If I look at these two side by side it seems to me that the same essence of the design is to be found in each of the two, and, therefore, I come to the conclusion that a case of infringement is made out as regards the second infringement alleged as well as the first. Mr. Moulton suggested that it would be very hard on the public that a person who had registered a design should, by insignificant variations, registered from time

to time, be able to extend the term for which he obtained protection. What seems to me to be the complete fallacy in the argument is that the term is not extended, but as soon as the original registration expires, everybody can exactly copy what was originally registered. If those variations are immaterial, and not improvements, and not advantageous, and do not make a wholly new and desirable design, anybody wishing to make the article has only to avoid those variations. He is at full liberty to make use of the original design as he pleases. Therefore, I cannot see that the public is in the slightest degree affected if those alterations and modifications are immaterial, slight and unimportant, and do not make the thing as a whole a desirable thing, which the public will seek to become the owners of. If they do, what better proof can you have that it was a new and original design which the person designing ought to be entitled to have the benefit of? In the present case there has been nothing to shew that enlarged bases—anything like either those of the plaintiffs or defendants—had been before the public previously. The plaintiffs follow the introduction to public notice of this first design by a second. The following year the defendants, having already copied the plaintiffs' first design, introduce their second design, which again bears a strong resemblance to the second design of the plaintiffs. Now, that seems to me certainly to assist the conclusion which I should arrive at independently, that there was a novelty in the modification introduced by the plaintiffs' second design, something which made the thing as a whole more desirable, and that the defendants, seeing that, sought to put before the public something which contained the essential features of the plaintiffs' second design. For these reasons I think that the case is made out as regards the second design as well as the first.

I think, therefore, that the judgment must be reversed, and that judgment must be entered for the plaintiffs in the action, with an injunction on the usual terms, and the usual order as to damages.

A. L. SMITH L.J., after stating shortly the circumstances under which the appeal had been brought before the Court,

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continued as follows:—The points for decision seem to me to arise in this order. The plaintiffs must shew, as regards each of their registered designs, that they had a new and original design which had not previously been registered, and they must shew some substantial novelty in the design, having regard to the nature of the article itself. Many printed documents were put in by the defendants for the purpose of shewing that the design which was registered in April, 1891, was not a new and original design, because of matters which were well known to the trade and to the public prior to that date. Now, in my opinion, they wholly failed in establishing this. Nothing was shewn prior to April, 1891, to lead the Court to the conclusion that any stove similar in design to that which the plaintiffs had registered in April, 1891, had been in vogue, or known at all, and that part of the defendants' case fails.

The defendants next say that the plaintiffs' claim is bad because what they claim in their registration is for pattern, shape and configuration, and that they claim for each of these separately and not collectively; and that as regards shape it would be bad, because the shape of a hexagonal upright stove was known before. In my opinion, whatever this claim may embrace, it certainly does embrace these matters collectively—it claims for the design, and it claims as part and parcel of that design the pattern, shape and configuration. The word "totality" has been used more than once during this case. I adopt that word. The plaintiffs claim the design, that is, the pattern, shape and configuration, that is, the totality of it. When that was put to Mr. Moulton he admitted that if that construction was to be put upon this registration he had nothing to say as regards the infringement of the registration of the first design. I think he was right as regards that. Speaking for myself, using the arbitrament of the eye, which is undoubtedly legitimate, I never saw a more obvious similarity than between those two stoves. As I said in the course of the argument, if I had gone into a shop and seen the plaintiffs' stove and ordered it, and they sent me home the defendants' stove, I should not have known that I had not got what I had ordered. At a distance they are so similar that one is

an obvious imitation of the other. I agree that if they are brought into close proximity, and the details of the tracery are pointed out, one can see a dissimilarity between them, but it is such a dissimilarity that in my judgment, if they were not together, one would not carry those dissimilarities in one's head, and, therefore, to say that one is not an infringement of the design of the other is to say what in my judgment is not in reality the truth.

I wish to say one word upon a matter which has been touched upon by Lord Herschell. It is as to the manner in which the defendants obtained the design for their stove which is said to be the infringement. Mr. Priest, who was a witness, and who, Kekewich J. said, gave his evidence very fairly, said this: "The defendants brought me the plaintiffs' stove and gave me instructions to make an original design for a similar article, and to make it of similar size to the plaintiffs'." What is the meaning of that? It means—make a design which will pass muster, and which will not be an infringement, but make it as near to the plaintiffs' as ever you can. And so Mr. Priest did, and in the result we have those two, which are as similar as possible to each other, except in some parts of the tracery, the one being as colourable an imitation of the other as could well be made. Therefore it seems to me that, as regards this first registration of April, 1891, the plaintiffs have made out their case.

There was a point taken about the plaintiffs having placed some other numbers upon some of their stoves which the defendants say was calculated to deceive the public. Lord Herschell has dealt with that point. He has said that it is catching at a straw, and I quite agree with him, and I do not think there was any substance in the objection as a defence to this action.

I now come to the further point, and that is as regards the registration in June, 1892. That is a registration for an improvement upon the original design of April, 1891. It is described as "an improvement on our registered design applicable for pattern and shape." I understand this was found to be the case. The plaintiffs wanted a stove in commerce which

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would carry a larger lamp, and therefore give a better heat, and so they wanted the stove to be enlarged, and thereupon, as an improvement to the original design, the plaintiffs brought out the design of June, 1892, and got that registered as an improvement upon the first. It is said that that was not novel. I think the improvement was novel. It is said it is only enlarging the base of the original design; but the way in which it was carried out so as to keep to the same semblance of the "Cathedral Stove" which was in the design of April, 1891, and not deviate from that, while, at the same time, enlarging the base was, I think, novel, and therefore the registration was good.

Now what do we find the defendants doing? As the original design was brought out in 1891 the defendants brought out that which this Court now holds to be an infringement. When the second design of June, 1892, was registered, and the stove was brought out in the next year, we find the defendants with regard to that doing exactly the same thing. But it is said by Mr. Moulton that the two are different, and that if we hold the second design to be good on account of the improvement as regards the base, it must be taken as it is improved; and when you look to the defendants' stove, which is said to be an infringement of it, it is not an infringement at all. Now as I look at the plaintiffs' second design it seems to me that they make a wider base by means of a sloping shelf, whereas the defendants make a wider base by means of sloping steps. The same kind of exterior is kept, the same appearance remains in the one as in the other, and I think an infringement has been made out by the defendants of the design of June, 1892, as also of the design of April, 1891. It therefore follows that there must be an injunction, and an inquiry as to damages, and a direction in the ordinary form for the giving up of the articles manufactured. The term of the original registration will of course expire at its original date.

RIGBY L.J. Setting aside in this case all the evidence as to the state of knowledge at the time when the plaintiffs registered their first stove, or rather treating all that evidence as of no importance, because none of the articles produced, to my mind,

at all resemble the design of the plaintiffs', we have simply to trust to the eye, and, looking at the two stoves, I am not only satisfied that one is an imitation of the other, but I feel satisfied, quite independently of the rest of the evidence—though that leads to the same conclusion—that the design of the defendants would never have come into existence if it had not been for the design of the plaintiffs.

Again, considering the second registered design of the plaintiffs, and taking into account what has been said about its resemblance to the first, I judge when I look at it that it is a novel design, and looking again to the alleged infringement of the copyright in that design, I come to the same conclusion as before, namely, that the defendants' stove would not have existed as it does but for its being an imitation of, and in fact copied colourably from, the second registered design of the plaintiffs.

That being so I feel no doubt about the validity of the registration in each case, or the fact of infringement. I would only say, with regard to the question that was raised as to pattern, shape and configuration, that what is the subject of protection under this Act is a design; but it is not every design that can be protected; it must be a design capable of use in manufacture—that is to say, according to the definition of the Act, in the 60th section, it is to be "applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural," not a design otherwise than as applicable to manufacture. Then, in order that there should be no doubt as to the meaning of the word "applicable," the section proceeds with the words "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes." There is an explanation both of the word "design" and of the word "applicable," in order that any mistake about the meaning of these words should be avoided. When rule 9 of the rules made under the Act is looked at, you find that it lays down, in somewhat curious language, that in making an application for the registration of a design, the applicant shall state whether it is applicable for pattern, shape, or configuration. It appears to me that there are very many cases in which that statement would be useful, but whether the statement so made

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would limit the claim of the applicant for protection in the design we have not now to determine at all, for in the case before us there was a design for a particular thing, which we agree consisted of nothing but that thing, its pattern, configuration and shape, but not as applicable to anything else. I do not see really what is in such a case the meaning of the requisition that the applicant shall say how the design is applicable. At any rate, in this case I have no doubt that the plaintiffs have in no way limited their right to protection for their design by stating that it is applicable to the shape, pattern and configuration altogether. The design is applicable in its totality in every way in the present case, and the argument founded on that rule, I think, comes to nothing.

With reference to the other and more general point that the plaintiffs are said in some cases to have misused their registered designs, I look in vain to the Act to find that any such misuser would cause a forfeiture of their right. I do find in s. 51 a very stringent obligation upon them that upon every article sold which contains their registered design they shall, under pain of forfeiture, place a mark referring to the register. But I can understand that in many cases a plaintiff, or a person who has a registered design, may be in great difficulties. He would always want to be quite safe, and as long as he does nothing more than make himself quite safe under the Act I cannot see that he is doing anything wrong. But even if he put a reference to the register upon a thing which it was impossible to suppose that he thought to be covered by that registration, the Act does not say that, even in a strong case like that, he should forfeit his protection for the design actually registered. And even if we wished to introduce any such clause I cannot find that we have any jurisdiction to do so.

Appeal allowed.

Solicitors: *Flux, Leadbitter & Paterson, for Slater & Co., Darlaston; Burton, Yeates & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham.*

C. C. M. D. (1)

(1) This report was prepared by the late Mr. Martin Ware and has been revised by Mr. Dale, who reported the case in the court below.

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CHITTY J.

1895
Nov. 27.

[1895 B. 2578.]

Will—Settlement—Married Woman—Fee Simple—Separate Use—Restraint on Anticipation—Tenant by the Curtesy—Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*viii.*); *s.* 61, *sub-s.* 6—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 8—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

Under a will certain real estate was vested in trustees in trust for A. for life, and on her death in trust for her children equally as tenants in common: the shares of daughters to be for their separate use without power of anticipation. On a sale of the real estate upon A.'s death, two of the vendors who were married women claimed to convey as tenants for life within the meaning of the Settled Land Act, 1882. The purchaser contended that they must convey as absolute owners and obtain an order under s. 39 of the Conveyancing Act, 1881:—

Held, in an action for specific performance, that the husbands, if they survived, taking an estate by the curtesy by virtue of the general law and not under the will, and the estate given to the married women being one and entire with no limitation to the husbands, the effect of the restraint on anticipation was not to bring the case within s. 2 of the Settled Land Act, 1882, as creating a settlement whereby the estate was limited to persons by way of succession; and, therefore, that the married women were not tenants for life within the meaning of the Act.

This was a vendor's action for specific performance of an agreement to purchase certain freehold premises held on the trusts of the will of one Solomon Hilbert, dated May 12, 1863, the purchaser objecting to the title on the ground that it was defective, as two of the vendors, who were each entitled to a one-eighth share of the property under the will, were married women restrained from anticipation; the vendors, on the other hand, insisting that the married women were tenants for life, or had the powers of tenants for life within the meaning of the Settled Land Act, 1882.

It was ultimately agreed between the parties that the question for the Court to decide should be whether or no the married women were tenants for life or had the powers of tenants for life within the meaning of the Act, and that in any event there should be judgment for specific performance.

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The testator by his will bequeathed to his sons Caleb Hilbert and E. T. Hilbert his leasehold messuages, Nos. 1 and 2, College Road, Pimlico, upon trust to pay the net yearly rents to his daughter Mary Bates during her life, and after her decease upon trust to pay and divide the same unto and amongst all and every the child and children of the said Mary Bates in equal shares as tenants in common. And the testator appointed his said sons his executors, and declared that the rents so bequeathed to each of his daughters or granddaughters should be for her sole and separate use free from the debts, control, or engagements of any husband, and that neither of his said daughters or granddaughters should have power to anticipate the same in any manner whatever.

The testator died on June 18, 1866; and in 1890 the leasehold premises above mentioned were sold to the receiver of the metropolitan police, and the purchase-money (1700*l.*) was paid into court under the Lands Clauses Act.

By an order dated June 16, 1891, made by North J., a conditional contract was approved of by which 1600*l.*, part of the 1700*l.*, was to be invested in the purchase of the freehold messuages and hereditaments, No. 87, South End, Croydon (being the premises the subject of the contract between the plaintiffs and defendant); and by an indenture dated June 20, 1891, the same hereditaments were conveyed to the use of the said Caleb Hilbert and E. T. Hilbert in fee simple upon the trusts expressed and contained in the will concerning the leasehold premises above mentioned, so far as the same were applicable to freehold hereditaments and were then subsisting and capable of taking effect.

By an order dated July 29, 1891, made on the application of Mary Bates, in the matter of the freehold hereditaments subject to the trusts of the settlement of the leasehold hereditaments made by the said will, and in the matter of the Settled Land Acts, 1882 to 1890, Michael S. J. Macmorran and Henry Farthing were appointed trustees of the said settlement for the purposes of the said Acts.

Mary Bates died on April 6, 1893, a widow, having had nine children. One of such children died in the lifetime of the

testator; and of the remaining eight, all of whom were born in the testator's lifetime, four predeceased their mother, Mary Bates.

The plaintiffs were the four surviving children of Mary Bates, and were each entitled in her own right to one-eighth undivided share of the said hereditaments. Two of the plaintiffs, namely, Mary Farthing and Edith Ann Giles, were married after 1882, their husbands being still alive, and both of them having children living.

The action now came on upon notice of motion for judgment on admissions.

Byrne, Q.C., and *A. Macmorran*, for the plaintiffs. The shares of these married women restrained from anticipation are within the Settled Land Acts, and the married women are tenants for life within the meaning of those Acts. As to each share the settlement is still subsisting, for thereby only the restraint on anticipation exists.

The share of each granddaughter is held in trust for her for her separate use for life, and afterwards for her husband, if he survives her, for his life as tenant by the curtesy. She cannot except by will defeat her husband's interest. The land, therefore, is settled on persons in succession within s. 2, sub-s. 1, of the Settled Land Act, 1882.

E. P. Hewitt, for the defendant. There is no succession of estates within the meaning of s. 2, sub-s. 1. By operation of law the husband may or will succeed his wife; but that succession is not under or by virtue of the will. The husband has no present reversionary estate; he has only at the most a spes successionis. The separate use here applies to the fee simple; and as both ladies were married after 1882 they have a right of disposition by will under the Married Women's Property Act.

The two married women can only make a title by obtaining an order under s. 39 of the Conveyancing Act, 1881, removing the restraint on anticipation to which their shares are subject.

Byrne, Q.C., in reply.

[The following authorities were referred to: *Taylor* v.

CHITTY J. 1895 BATES v. KESTERTON.

Meads (1); *Cooper* v. *Macdonald* (2); *In re Tippett's and Newbould's Contract* (3); *In re Currey.* (4)]

CHITTY J. The question arises between vendor and purchaser. The vendors contend that the two married women are tenants for life within the meaning of the Settled Land Act, 1882. The vendors' argument results in this, that because the married women are restrained from anticipation therefore they can dispose of their shares in the land under the Settled Land Act. But I will examine the facts and the Act. To understand the argument it is necessary to go back to the will. The property is now freehold, and at the present moment it is held by the trustees upon the trusts of the leaseholds bequeathed by the will, and I must treat the property as freehold. The leasehold property was given by the will to trustees upon trust to pay the rents to Mary Bates for life (she died in 1893), and upon her death to pay and divide the yearly rents among her children as tenants in common. Mary Bates had eight children born in the testator's lifetime, and who survived him, and the married women in question are entitled to two shares. The testator then declared that the rents bequeathed to his granddaughters should be for their separate use, their receipts to be a good discharge, and that neither of his granddaughters should have power to anticipate. The limitations to the granddaughters though addressed to a class were good limitations, and not void for remoteness: *In re Russell.* (5) It is said that there is a settlement within the meaning of the Settled Land Acts, and that the married women have the powers of tenants for life. It is argued that the married women having issue capable of inheriting under the limitations to their mothers, and that the husbands, if they survive, being entitled by the curtesy, therefore by the effect of the will there is a settlement. One thing is quite plain, that there is only one estate created by the will, and that is limited to the married women. In *Taylor* v. *Meads* (6), where property was vested in trustees upon trust for a married

(1) 4 D. J. & S. 597.
(2) 7 Ch. D. 288.
(3) 37 Ch. D. 444.
(4) 35 W. R. 326.
(5) [1895] 2 Ch. 698.
(6) 4 D. J. & S. 597, 607.

woman, her heirs and assigns, with a power of appointment, and in default of appointment in trust for her, her heirs and assigns for ever, with a declaration that she should notwithstanding her coverture stand possessed of the property for her sole and separate use and benefit, and that the same should not be liable to the control of her husband, Lord Westbury said: "The estate given to Elizabeth Meads" (the married woman) "is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman." In that case there was no restraint against anticipation. In *Cooper* v. *Macdonald* (1), where a married woman who, under the limitations of a will, was equitable tenant in tail to her separate use of certain freehold property but restrained from anticipation, had barred the equitable entail, and died, having by her will devised the estate for the benefit of her children, it was held that the restraint on anticipation did not prevent the wife from barring the entail and acquiring the equitable fee, and that the wife having thereby acquired an equitable fee to her separate use had power to defeat her husband's right to curtesy by devising the estate.

I think on the construction of the will before me that there is a separate use affixed to the fee simple, and that the married women can make a will: so long as they remain covert they cannot dispose of the property by deed; if their husbands die in their lifetime they can deal with the property as they think fit. In my opinion there is by this will one estate vested in the married women subject to the restraint against anticipation which equity has allowed to be imposed.

I now come to the Act of Parliament. Sect. 2, sub-s. 1, enacts that any instrument under or by virtue of which land stands limited to or in trust for any persons by way of succession creates a settlement. It is said for the vendors that the effect of the restraint on anticipation brings the case within that

(1) 7 Ch. D. 288.

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section, and that, therefore, the land stands limited to or in trust for persons in succession. In my opinion that argument is not correct. It is not under the will that the husbands, if they survive, will take an estate by the curtesy, but by virtue of the general law.

The case, however, does not stand alone on that section: it is necessary to deal with s. 61. There is nothing in the foregoing provisions which makes a married woman entitled in fee simple in possession either tenant for life, or a person having the powers of a tenant for life. There was no need for it. There is also nothing which would apply to the case of a married woman entitled in possession to the fee simple of lands settled to her separate use as in *Taylor* v. *Meads*. (1) Sub-s. 1 runs thus: "The foregoing provisions of this Act do not apply in the case of a married woman." The case of a married woman entitled in fee simple for her separate use is not within sub-s. 2. I pass over sub-ss. 3, 4, and 5, and I come to sub-s. 6, which runs thus: "A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act," which means that where she is tenant for life the mere restraint on anticipation is not to prevent the exercise by her of the powers. The sub-s. does not say that because she is restrained from anticipation therefore she is a tenant for life, or has the powers of a tenant for life. The vendors' case was founded on this, that the husband may take an estate by the curtesy; there is an initiate estate in the husband by the curtesy.

The Act of 1882 enumerates among the persons who have the powers of a tenant for life "a tenant by the curtesy" (s. 58, sub-s. 1 (viii.)). That means a tenant by the curtesy in possession. Then s. 8 of the Settled Land Act, 1884, enacts that, "for the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife." That, again, means a tenant by the curtesy in possession.

I revert to the proposition that there is but one estate in the married women, and no limitation to the husbands by virtue of

(1) 4 D. J. & S. 597.

any settlement, but that if they survive their wives they will take by the general law.

Putting the whole case together, I am of opinion that the vendors have not succeeded in making out the proposition that because the married women are restrained from anticipation therefore they have the powers of tenants for life within the meaning of the Settled Land Act, 1882.

[His Lordship declared that the married women were not tenants for life and had not the powers of tenants for life under the Settled Land Acts, and pronounced judgment for specific performance on the terms of the agreement come to between the parties, and ordered that, for the purpose of enabling the sale to be completed, the restraint on anticipation should, under s. 39 of the Conveyancing and Law of Property Act, 1881, be entirely removed on the production of an affidavit that the married women were not entitled to any other property under the will and that the husbands desired the restraint to be removed, and that in such case their shares of the purchase-money might be paid to them instead of to the trustees appointed under the Settled Land Act.]

Solicitors: *Mead & Sons; Preston, Stow & Preston.*

G. M.

CHITTY J.

1895

Nov. 29.

VAWDREY *v.* SIMPSON.

[1895 V. 2687.]

Partnership — Arbitration Clause—Action for Dissolution—Motion to stay Proceedings—Discretion of the Judge—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Where articles of partnership contain a clause referring all matters in difference between the partners to arbitration, an arbitrator has power to decide whether or not the partnership shall be dissolved, and to award a dissolution, though the judge has full discretion to determine, on a motion to stay proceedings under the Arbitration Act, 1889, s. 4, whether the matters in dispute shall be tried out in the action or referred to arbitration.

Walmsley v. *White* (40 W. R. 675) followed.

Joplin v. *Postlethwaite* (61 L. T. (N.S.) 629) explained.

Motion by the defendant under the Arbitration Act, 1889, s. 4, to stay all proceedings in this action.

By articles of partnership of July 11, 1892, made between the plaintiff of the one part and the defendant of the other part, it was agreed that the plaintiff and defendant should become and remain partners as physicians and surgeons as from July 1, 1892, for the term of their joint lives, subject to determination nevertheless as thereinafter mentioned.

The articles contained the usual clauses regulating the conduct of the partners and the management of the partnership business; and by article 28 it was provided: "If any dispute misconception or misconstruction shall arise between the parties hereto, touching the terms stipulations and conditions of this agreement, or the construction thereof, or any matter in any way connected with these presents or the operation thereof, or the rights duties and liabilities of either party in connection herewith, the matters in difference shall be referred to arbitration under the provisions of the Arbitration Act, 1889."

Disputes and differences subsequently arose between the partners as to the conduct of the partnership business, and in May, 1895, the plaintiff commenced the present action against the defendant, claiming a dissolution of the partnership, an account of the partnership dealings, damages, and costs. In

July a statement of claim was delivered setting out numerous alleged breaches of the partnership articles, which, the plaintiff contended, rendered it impossible that the partnership could be carried on any longer; there were, however, no charges of fraud or dishonesty, or of anything criminal.

The defendant now moved under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), that all matters in difference in this action be referred to arbitration in accordance with the partnership agreement.

J. G. Butcher, for the motion. The action is unnecessary and ought to be stayed. The arbitration clause contained in these articles of partnership is substantially the same as those in *Russell* v. *Russell* (1) and *Walmsley* v. *White* (2), so that under this clause the arbitrators can, if they think fit, award a dissolution. There seems to have been some difference of opinion as to whether an arbitrator had power to award a dissolution, but that question is now set at rest by *Walmsley* v. *White*. (2) *Russell* v. *Russell* (1) shews that where there is no charge of fraud, the matters in dispute should go to arbitration. *Belfield* v. *Bourne* (3) is another decision in my favour. *Joplin* v. *Postlethwaite* (4) appears to be against me, but, when it is examined, I submit that it is not inconsistent with the decisions on which I rely, though *Russell* v. *Russell* (1) was not cited. *Joplin* v. *Postlethwaite* (4) was cited and examined in *Walmsley* v. *White* (2), and yet the Court held that an arbitrator had jurisdiction, under a clause of this kind, to award a dissolution. I admit that the Court has a discretion whether or not it will stay proceedings, or allow the question to be settled by arbitration; in the present case, arbitration is by far the most suitable method of determining all the questions between the parties, and the action ought therefore to be stayed.

Macaskie, for the plaintiff. The dispute between the partners is so serious that there must be a dissolution, and the question whether or not the partnership should be dissolved is one for the Court: *Joplin* v. *Postlethwaite*. (4) That case is in my

(1) 14 Ch. D. 471.
(2) 40 W. R. 675.
(3) [1894] 1 Ch. 521.
(4) 61 L. T. (N.S.) 629.

CHITTY J. 1895 VAWDREY v. SIMPSON.

favour, and, being a decision of the Court of Appeal, it is binding on this Court. In *Turnell* v. *Sanderson* (1) Kekewich J. states that *Joplin* v. *Postlethwaite* (2) is a distinct expression of opinion by the Court of Appeal that a question of dissolution does not come within the arbitration clause in partnership articles.

[CHITTY J. I cannot find that proposition anywhere laid down in the judgment of the Court of Appeal. I observe, too, that *Russell* v. *Russell* (3) was not cited. In *Joplin* v. *Postlethwaite* (2) Kay J., in the exercise of his discretion, declined to stay proceedings, and the Court of Appeal in that case held that he was right, and that he was not bound to stay the proceedings.]

Where the principal object of the action, as here, is dissolution, the Court ought not to stay proceedings in order to refer the question to arbitration. In *Belfield* v. *Bourne* (4) the main question was as to the return of the premium paid by one of the partners. Stirling J. commences his judgment by saying (5): "It was admitted that the clause cannot be distinguished in substance from that which formed the subject of decision in *Russell* v. *Russell* (3) and *Walmsley* v. *White*. (6) It was consequently admitted that under it the arbitrators could consider the question of a dissolution, and award that a dissolution should take place, if they thought fit." The question of the jurisdiction of an arbitrator to award dissolution was not argued. In *Walmsley* v. *White* (6) the Court only declined to interfere with the discretion of the judge in the Court below. The applicant makes no case for staying these proceedings.

Butcher, in reply. In *Turnell* v. *Sanderson* (1) *Russell* v. *Russell* (3) was not cited; it was decided, too, before *Walmsley* v. *White* (6), which, I contend, settles the law.

CHITTY J. *Walmsley* v. *White* (6), before the Court of Appeal, has settled the question, about which a difference of opinion seems at one time to have been entertained, whether,

(1) 60 L. J. (Ch.) 703.
(2) 61 L. T. (N.S.) 629.
(3) 14 Ch. D. 471.
(4) [1894] 1 Ch. 521.
(5) Ibid. 523.
(6) 40 W. R. 675.

when articles of partnership contain an arbitration clause similar to the one before me, an arbitrator has power, if he see fit, to award a dissolution. In that case the judge in the Court below had made an order that the action should be stayed, and the Court of Appeal declined to interfere with his discretion. But it is a distinct decision that an arbitrator has power in a case like this to award a dissolution; it is, therefore, unnecessary for me to go into and examine any of the other authorities which have been cited to me. It is plain, too, from *Walmsley* v. *White* (1) and *Joplin* v. *Postlethwaite* (2), that the Court of first instance has full discretion, on an application of this kind, to determine whether the matters in dispute shall be tried out in the action, or whether proceedings shall be stayed and the question referred to arbitration: a discretion of course to be exercised judicially, and according to well known and ordinary principles. In both these cases the Court of Appeal declined to interfere with the discretion already exercised by the judge in the Court below.

According to the language of s. 4 of the Arbitration Act, 1889, the order to stay proceedings asked for by this defendant is to be made, if the judge is satisfied that there is "no sufficient reason why the matter should not be referred in accordance with the submission." The submission in this case is quite wide enough to embrace the question of dissolution and the other questions in dispute as well, and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the application to stay proceedings, though the Court must consider all the circumstances, and exercise its discretion according to the varying nature of the different cases presented to it.

The partnership in the present case is between two medical men; no charges are made by the plaintiff against his partner of fraud, dishonesty, or anything criminal, charges which the Court might very well say are too serious to be tried by an arbitrator. It would not be right for me in open Court to go into the exact nature of the charges made, as I intend to send this case to arbitration. It will be sufficient for me to say that

(1) 40 W. R. 675. (2) 61 L. T. (N.S.) 629.

CHITTY J.
1895
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the statement of claim shews that serious disputes have arisen between the partners of a kind which, in my experience, often do arise between medical men; but there is nothing in any of them which specially requires the experience and knowledge of law usually attributed to Her Majesty's judges, and in my opinion there is no reason why any lay arbitrator cannot satisfactorily dispose of this case. The result, therefore, is that I make the order to stay all proceedings in the action, and direct that all matters in dispute between the parties be referred to arbitration in accordance with the partnership agreement.

Solicitors: *Gustavus Thompson & Son, for Eve & Clinton, Aldershot; T. Blanco White.*

W. C. D.

NORTH J.
1895
Nov. 27.

In re SMITH.
ARNOLD *v.* SMITH.

[1895 S. 2101.]

Will—Trust for Sale—Power to Postpone Sale—Power to Carry on Business.

A power to postpone the sale of all or any part of a residue devised and bequeathed on trust to sell, and particularly to sell his business of a pawnbroker with all convenient speed, *held* not to give power to carry on the business for an indefinite time.

The Court, under the circumstances, authorized the trustees to carry on one of the testator's two businesses (of a pawnbroker) for two years.

In re Crowther ([1895] 2 Ch. 56) considered.

THIS was an originating summons taken out by the present trustees of the will of Thomas Smith, a pawnbroker, who died April 12, 1895, against the four infant children of the testator, to determine two questions on the construction of the will of the deceased.

The will contained the following residuary gift: "I give all the rest of my estate both real and personal (estates vested in me upon any trust or by way of mortgage excepted) unto my said wife Annie my brother-in-law James Arnold of No. 6 Brownswood Park Stoke Newington in the said county of Middlesex gentleman, and my friend George Arnold of No. 6 St. Albans Villas Highgate Rise in the said county of Middlesex pawnbroker, their heirs executors and administrators respectively upon the trusts and with and subject to the powers and provisions hereinafter declared concerning the same (that is to say) upon trust that the said Annie Smith James Arnold and George Arnold or the survivor of them or the executors or administrators of such survivor or other the trustees or trustee for the time being of this my will (hereinafter called my trustees or trustee) shall with all convenient speed sell and convert into money my real estate and residuary personal estate or such part thereof as shall not consist of money and particularly shall with all convenient speed after my decease sell and dispose of my business of a pawnbroker (as a going concern) carried on by

NORTH J. 1895 *In re* SMITH. ARNOLD *v.* SMITH.

me at Nos. 47 and 49 Pitfield Street Hoxton and No. 257 Seven Sisters Road Finsbury Park together with the leases under which the premises are held for the best price that can be obtained for the same."

The trustees were directed to invest the proceeds of the testator's estate, and out of the income pay the testator's widow 300*l.* a year during widowhood and 100*l.* a year after she should remarry. The will contained a direction for the trustees to maintain the testator's infant children during the life of his widow in case she should remarry, and to accumulate the surplus income during her life, and to stand possessed of his residuary estate, including the proceeds of the aforesaid business upon trust for all his children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry.

The will subsequently contained the following provision: "I also empower my trustees or trustee to postpone the sale and conversion of my real and personal estate or any part thereof for as long as they or he shall think fit and in the meantime to let or demise any real estate including chattels real for any term of years not exceeding twenty-one years to take effect in possession at such rent and subject to such covenants and conditions as my trustees or trustee shall think fit."

The testator's two eldest children, Thomas Smith and Sidney Herbert Smith, were respectively aged twenty and eighteen. They had been employed by the testator in his business of pawnbroker, and there was evidence that the testator had intended that they should be brought up to follow the occupation of a pawnbroker. The greater part of the testator's estate consisted of his pawnbroking business and the capital employed therein. The trustees had made arrangements for the sale of the business carried on at Pitfield Street, Hoxton. But, in the opinion of the trustees, it was desirable in the interest of the family and the estate that the business carried on at Seven Sisters Road should be continued to be carried on till the second son should attain his majority, in order to give the two elder sons the opportunity of purchasing the business, which it was considered they would be able to do on terms advantageous

to all parties. One of the questions for the opinion of the Court was, whether, upon the true construction of the testator's will, the trustees were authorized to carry on for the benefit of the estate the business at Seven Sisters Road until the defendant Sidney Herbert Smith should attain the age of twenty-one years, or during some other and what period; and whether, under the circumstances of the case, they were justified in so doing.

Swinfen Eady, Q.C., and *Micklem*, for the plaintiffs, and *Harman*, for the defendants. A power to postpone a sale, directed to be carried out with all convenient speed, justifies the postponement for even a long period, where the circumstances are such as to render it desirable in the interest of the estate and the beneficiaries, as it is shewn to be here: *In re Crowther* (1); *In re Chancellor*. (2)

NORTH J. In this case I am asked to depart altogether from the terms of the testator's will. The point is put very fairly. It was said that it was much better that the property should not be sold, and that, in the view of the applicants, it was obviously to the interest of the family that one business should be carried on by the trustees for some time. If it were an entirely open question for me to consider, I am not sure that, in my judgment, it would not be for the interest of the family that the business should be carried on. The question is what the testator has authorized. I cannot and do not agree in the view that, under this will, the direction that the trustees "particularly shall with all convenient speed after my decease sell and dispose of my business of a pawnbroker (as a going concern)" is to be ignored and let down by the subsequent proviso: "I also empower my trustees or trustee to postpone the sale and conversion of my real and personal estate or any part thereof for as long as they or he shall think fit." I think that the testator did not consider it desirable that the business should be continued by his trustees; but that it should be sold with all convenient speed. On the other hand, he did not wish it

(1) [1895] 2 Ch. 56. (2) 26 Ch. D. 42.

NORTH J. 1895 *In re* SMITH. ARNOLD *v.* SMITH.

should be sacrificed by a forced sale. I do not think that the case of *In re Crowther* (1) goes so far as to shew that in this case the sale could be postponed for an indefinite time. There were no such special words in the will in that case as there are here. Whether *In re Crowther* (1) has not gone too far I will not stop to consider. But what is suggested does seem to me to go beyond that decision. All I can do is to do what the Court of Appeal did in *In re Chancellor.* (2) The trustees are not bound to sell immediately. I do not think it will be unreasonable that they should have two years. I think I can authorize them to postpone the sale of the business at Seven Sisters Road for two years from the testator's death. Of course, if a favourable opportunity arose in the meantime it should not be thrown away. There will be liberty to apply at the end of two years. I think the sons may probably buy the business. It would be worth more to them than to others.

Solicitors for all parties : *May, Sykes & Co.*

(1) [1895] 2 Ch. 56. (2) 26 Ch. D. 42.

D. P.

In re LAWSON'S TRUSTS.

NORTH J.

1895

Nov. 30.

[1895 L. 0122.]

Practice—Fund in Court—Payment out—Deceased Insolvent in British India —English Administration not required.

A fund in Court, which stood to the credit of a person who had become insolvent at Bombay, and had afterwards died there intestate, was ordered to be paid out to the official assignee of the Insolvent Court at Bombay, in whom all the property of the insolvent had been vested by an order of that Court, without requiring administration in England to be taken out, administration having been granted to his estate in India, and there being evidence that the debts proved in the insolvency were still unpaid, and that the insolvent had not obtained his discharge.

In re Davidson's Settlement Trusts (L. R. 15 Eq. 383) followed.

PETITION by Charles Agnew Turner, the official assignee of the Court for the Relief of Insolvent Debtors at Bombay, asking for the transfer and payment out of Court to him of a sum of 2742*l.* 19*s.* 3*d.* New Consols, and a sum of 18*l.* 4*s.* 7*d.* cash, which were respectively in Court to the credit of "The trusts of the sum of 1500*l.* bequeathed by the will of J. W. Lawson in favour of H. W. Graham Lawson."

The testator, by his will, dated October 2, 1872, bequeathed the sum of 1500*l.* to his son, H. W. Graham Lawson. The testator died on September 24, 1874.

H. W. Graham Lawson, while he was residing within the jurisdiction of the Supreme Court of Bombay, applied, by a petition filed on November 3, 1866, to the Court for the Relief of Insolvent Debtors, within the Presidency of Bombay, for the benefit of the provisions of the Act 11 & 12 Vict. c. 21, intituled, "An Act to Consolidate and Amend the Laws relating to Insolvent Debtors in India."

On November 3, 1866, an order was made by the Bombay Court that all the real and personal estate and effects of the debtor, whether within the territories within the limits of the charter of the East India Company, or without (except the wearing apparel, bedding, and other such necessaries of the

NORTH J. 1895 *In re* LAWSON'S TRUSTS.

debtor and his family, and the working tools and implements of the debtor and his family, not exceeding in the whole the value of Company's Rs.300), and all debts due to him, and all the then future estate, right, title, interest, and trust of the debtor in or to any real or personal estate or effects within or without the said territories which the debtor might purchase, or which might revert, descend, be devised, or bequeathed, or come to him, and all debts growing due to him, before the Court should have made its order in the nature of a certificate, as in the Act mentioned, should vest in the official assignee for the time being of the Court. This order was made under s. 7 of the above Act, and in the express terms of that section, which also provides that "such order, when so made, shall by virtue of this Act relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects, and debts as aforesaid in the said official assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned."

H. W. Graham Lawson died at Bombay on June 4, 1873 (in the lifetime of his father), intestate, leaving a widow and three children him surviving. Administration to his estate in the East Indies, which was sworn under the value of Rs.2350, was, on August 20, 1873, granted by the Court in Bombay to the Administrator-General of Intestate Estates at Bombay. No administration to the estate of the intestate in England had been granted.

On August 8, 1876, the trustees of the father's will paid into court to the credit of the above account the sum of 1538*l.*, as representing the legacy of 1500*l.* bequeathed by the father's will to the intestate, with interest thereon, after deducting legacy duty. The amount so paid in, with accumulation of interest, was now represented by the above-mentioned sums of Consols and cash in court.

No order in the nature of a certificate discharging the debtor as mentioned in the above Act had been made in the insolvency.

The debts proved in the insolvency amounted to Rs.316,325. The assets amounted to Rs.53,095, of which Rs.28,214 were bad.

The funds in court not having been dealt with for fifteen years, the petition was served on the official solicitor. The other respondents were the trustees of the father's will and one of the intestate's next of kin.

Everitt, Q.C., and *T. L. Wilkinson*, for the petitioner.

F. T. Procter, for the respondents, did not oppose.

Method, for the official solicitor. The only question is, whether administration ought not to be taken out to the intestate in England. Duty is payable by the representatives of the son: *Executors of Perry* v. *Reg.* (1)

Everitt, Q.C., in reply. It is not necessary that English administration should be taken out: *In re Davidson's Settlement Trusts.* (2)

NORTH J. I think that case in point; and it shews that administration in this country need not be taken out. I make the order as prayed by the petition.

Solicitors: *àBeckett Terrell & Co.; Hanbury & Whitting; Official Solicitor.*

(1) L. R. 4 Ex. 27.

(2) L. R. 15 Eq. 383.

W. L. C.

ROMER J.
1895
Nov. 21, 22, 23.

LYNDE *v.* ANGLO-ITALIAN HEMP SPINNING COMPANY.

[1894 L. 2880.]

Company—Shares—Misrepresentation by Agent—Rescission of Contract.

A person suing a company to obtain rescission of an agreement to take shares in it must, generally speaking, bring his case under one of the following heads:—

(1.) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf.

(2.) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority, including the case of a person constituted agent by subsequent adoption of his acts.

(3.) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentation.

(4.) Where the contract is made on the basis of certain representations, whether the particulars thereof were known to the company or not, and it turns out that some of them were material and untrue.

THE Anglo-Italian Hemp Spinning Company was registered under the Companies Acts, 1862 to 1886, on November 28, 1890, one of its objects being to purchase certain hemp works at Ferrara, and to take over the business carried on there. The company was promoted by M. C. Thomson and Arthur Waithman. Clause 120 of the articles of association provided that the directors should adopt on behalf of the company an agreement dated November 12, 1890, and made between Waithman and Thomson of the one part and a trustee for the (then intended) company of the other part.

On May 28, 1891, the plaintiff applied for 300 ordinary shares and three founders' shares in the company. The application was made on a form which was supplied by Waithman, who obtained it from the company's solicitor. The shares were allotted to the plaintiff on June 10, 1891, and he was entered on the register of shareholders as holder thereof. Notice of allotment was given to the plaintiff, and he paid the company the allotment moneys due in respect of the shares.

Neither Waithman nor Thomson was appointed a director of the company until December, 1891. No prospectus inviting applications for shares was ever issued, but both Waithman and Thomson were active in obtaining their friends to subscribe for shares, and certain verbal representations were made by Waithman to the plaintiff before the latter applied for his shares, and in the present action (against the company alone) the plaintiff alleged that he was induced to take the shares by untrue representations made to him by and on behalf of the defendant company and by the concealment of material facts. The alleged misrepresentations were with reference (*a*) to the business purchased by the company, (*b*) to the motive in selling of the person from whom the business was purchased, (*c*) as to the number of shares in the company disposed of by Waithman, (*d*) that Waithman was to get nothing out of the formation of the company, (*e*), (*f*), (*g*) as to promotion money, state of repair of the works, the foregoing by Waithman and Thomson of benefits under the agreement.

The plaintiff said that all the alleged misrepresentations were made to him by Waithman verbally in December, 1890, and March, 1891; that they were made by him as the agent and on behalf of the company; and that the company had adopted his acts as their agent. The plaintiff accordingly claimed rescission of his contract to take the shares, rectification of the register of shareholders by the removal of his name therefrom, repayment of the allotment moneys and payment of interest thereon, and an injunction to restrain the company from enforcing calls made on the shares.

The company pleaded (inter alia) that it had been managed from its commencement by directors, who were persons other than Waithman and Thomson; that Waithman was not the agent of the company to obtain applications for shares, or authorized by the company to make any representation or concealment; and that the company had never adopted his acts or any of them. And the company counter-claimed against the plaintiff for calls on the shares.

The action was tried with witnesses before Romer J. on November 21, 22, and 23, 1895.

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Eve, *Q.C.*, and *E. C. Macnaghten*, for the plaintiff. The evidence establishes that Waithman was the agent of the company in what he did, and that it has adopted his acts as its agent. It is immaterial that no prospectus was issued by the company or by its directors on its behalf. An oral statement made to the knowledge of the company is equivalent to a prospectus. When promoters of a company about to be incorporated issue a prospectus inviting applications for shares, and on the faith of untrue statements in it a person applies to the company, when formed, for shares, he is entitled as against the company to have his contract rescinded because the prospectus is the basis of the contract: *Karberg's Case*. (1)

[ROMER J. There the company was aware of the representations when the shares were allotted.]

This case is really stronger than *Karberg's Case* (1), for the company in this case was actually in existence when the representations were made. Its officers knew that Waithman was going about soliciting applications for shares, and its own solicitor supplied him with the form on which the application was made. Moreover, Waithman was largely interested in the company's obtaining a large subscription for its shares.

[They also referred to *Tamplin's Case*. (2)]

Hopkinson, *Q.C.*, and *Mulligan*, for the company. Waithman was never the company's agent. He was not a director when he made to the plaintiff such representations as were made. Even if he had been a director, the company would not have been liable for misrepresentations made by him without its knowledge, though shares had then been applied for and allotted.

The secretary of a company has no general authority to make representations to induce persons to take shares in a company, and if a person is induced to take shares by a fraudulent misrepresentation (not authorized to or known by the officers of the company entitled to make representations) of the secretary, the shareholder cannot obtain rescission of his agreement: *Newlands* v. *National Employers' Accident Association* (3). No

(1) [1892] 3 Ch. 1. (2) W. N. (1892) 94, 146.
(3) 54 L. J. (Q.B.) 428.

representation having been made on behalf of the company, the question is, What contract did the plaintiff enter into? It was to take the shares; and he is bound by it. In *Karberg's Case* (1) the company, after its incorporation, issued a prospectus substantially the same as that on the faith of which the shares were applied for. In *Tamplin's Case* (2) the shareholder had not relied on the company's prospectus or on any representation made by the company, and he was held to be bound, though on appeal it was assumed that the facts were within *Karberg's Case*. (1)

But these two cases were quite different from this, because the shareholder acted on a specific statement made by someone capable of binding the company. It would be hard on companies if shareholders could, years after taking shares, get off the register on account of what individual directors had said after dinner.

[ROMER J. referred to *Western Bank of Scotland* v. *Addie*. (3)]

That decision does not mean that the company is answerable for any misrepresentation made by a person simply because he is a director. If a person has been drawn in by the misrepresentations of an individual member of a company, he cannot thereby exonerate himself from liability. His remedy is against the individual shareholder. The directors are the company's agents; but the difficulty is in saying they are its agents for the purpose of making false representations: *Gibson's Case*. (4) It was there held that erroneous representations made by promoters did not exonerate a shareholder from liability.

[ROMER J. That case probably means that the Court did not consider the promoters were the company's agents.]

In order that the company should be liable the directors must be acting for it, and acting as a board. If, for instance, a shareholder joins a company on the assurance of one director of it that it is a flourishing concern, when really it is on the verge of insolvency, he is not relieved from liability: *Holt's Case*. (5)

(1) [1892] 3 Ch. 1.
(2) W. N. (1892) 94, 146.
(3) L. R. 1 H. L., Sc. 145.
(4) 2 De G. & J. 275, 282, 283.
(5) 22 Beav. 48.

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[They also referred to *Bell's Case* (1) and *Campbell* v. *Fleming*. (2)]

Eve, Q.C., in reply. The circumstances shew that the company knew Waithman was soliciting applications for shares. It must have known he was saying something when acting for it, and it is liable for what he said even if he was not expressly authorized to make misrepresentations.

[ROMER J. Suppose a company is expressly informed that a person has been induced to apply by a particular representation, and knowing that it allots to him, is it bound to inquire as to the representations; and if it does not, and it turns out that the representations are false, is it liable to have the contract rescinded? I do not know of such a case; but I do not think this is that case.]

The case put seems to come within *Karberg's Case* (3), because the statement is the basis of the contract for the application and allotment. The statement there was made by promoters, and not by the company; but if the company adopts what a man has done as its agent, it adopts the frauds he has committed in acting as agent.

[The question whether the plaintiff was too late in coming for relief, after having, as he alleged, discovered that the representations made to him were untrue, was argued, but not decided.]

ROMER J. The first question I desire to deal with is this—Assuming that Mr. Waithman made material misrepresentations to the plaintiff which induced him to apply for the shares, could the plaintiff, on that ground, hold the company liable, and have the contract set aside? It appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it the shareholder must bring his case within one or other of the following heads:—(1.) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf—as, for example, by a prospectus issued

(1) 22 Beav. 35. (2) 1 Ad. & E. 40.
(3) [1892] 3 Ch. 1, 11.

by the authority or sanction of the directors of a company inviting subscriptions for shares; (2.) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority—as, for example, by an agent specially authorized to obtain, on behalf of the company, subscriptions for shares. This head of course includes the case of a person constituted agent by subsequent adoption of his acts; (3.) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations—as, for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority; (4.) Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as, for example, if the directors of a company know when allotting that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors.

I think *Karberg's Case* (1) was one falling within and decided under this head. Lindley L.J. said that one question he had to answer was this (2): "Was the prospectus" in that case, being a prospectus issued before the company was formed, "the basis of the contract formed by the application and allotment of shares?" And he answers that question when he says (3): "The offer to take shares is an offer to take them on the terms of the prospectus, and on no other terms; and the acceptance of the application by the allotment of the shares is the acceptance of the offer on those terms, and not on other terms." And I gather that that was the ground of the decision in *Karberg's Case*. (1)

There may possibly be other cases not coming within the above heads, though none occur to me at the present time; but certainly the present case, if it does not come within any

(1) [1892] 3 Ch. 1. (2) [1892] 3 Ch. 11.
(3) [1892] 3 Ch. 13.

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of the above heads, has no special features about it that would entitle the plaintiff to the relief he asks.

Now, it appears to me that the plaintiff does not bring his case within any of these heads. Such misrepresentations, if any, as were made to the plaintiff were made by Mr. Waithman, one of the two promoters of the company. But the company at the time had two directors entitled to act for it, and Mr. Waithman was not a director or general agent of the company. No doubt the promoters had a great deal to do with the company at the time, and their wishes and views may have been highly regarded by the directors. But I see nothing to justify me in coming to the conclusion that the promoters are to be regarded as really constituting the company, or that the directors left everything in their hands, or were what may be called dummies, or left it to the promoters to do whatever they pleased in the affairs of the company. Nor was Mr. Waithman, when he made the representations he did make to the plaintiff, authorized to act on behalf of the company in procuring shares or authorized to make any representations on behalf of the company to the plaintiff or others to induce him or them to apply for shares. The fact that Mr. Waithman was a promoter of the company did not in itself authorize him to procure shares for the company, or to make representations to the plaintiff on the company's behalf. A contract to take shares may be induced by misrepresentations made by an officer of a company or by a promoter of a company, or by a person assisting in procuring shares of a company; but that fact alone will not be sufficient to enable the contract to be rescinded. The cases cited by Mr. Hopkinson are sufficient to shew this. And although the company knew that Waithman was applying to his friends to get them to subscribe for shares, that did not, in my opinion, make him the company's agent, or put the company to inquire as to whether he had made any, and, if any, what, representations to those friends to induce them to subscribe. In most cases directors must be aware that subscriptions for shares are obtained through the intermediary of persons interested in the company, and it would lead to the most astonishing results if that was held sufficient to affect the directors with

knowledge of, or to put them upon inquiry as to, the representations, if any, made by those persons to the people applying for the shares. The fact that in the case of this company some applications, including that of the plaintiff, were made on printed forms prepared by the company's solicitor does not, in my opinion, make any real difference. Mr. Waithman got his forms by applying to the company's solicitor, because he wanted his friends to make proper applications for shares. No authority was given by the directors to the solicitor to supply Mr. Waithman with forms, nor can the directors, by seeing these forms used, be held thereby to have adopted Mr. Waithman as their agent in obtaining applications for shares. The directors did not issue any prospectus themselves or try to get applications for shares, and, no doubt, because they thought Waithman and Thomson would get a sufficient number of their friends to take up the necessary number of shares. But this did not, in my opinion, make Waithman and Thomson the special agents of the company to procure subscriptions on its behalf, or authorize them to make any representations on behalf of the company with a view of inducing their friends to subscribe.

And, lastly, this is not a case like *Karberg's Case* (1) or coming at all within the fourth head. The application for shares made by the plaintiff was not one made conditional upon, or to the knowledge of the directors based upon, any special or other representations made by Waithman. The application was not even, to the knowledge of the directors, induced by representations by Waithman, though, even if it had been, whether that would in itself have been sufficient to bring the case within my fourth head or have entitled the plaintiff to rescind I need not now inquire.

On this ground, therefore, I hold that the action must fail, for in my judgment the plaintiff has not shewn any ground upon which I can rescind this contract by reason of misrepresentations, if any, made to him which induced him to apply for these shares.

I should have been glad if I could have left the case there, because the point of law I have decided is in itself fatal to the

(1) [1892] 3 Ch. 1.

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plaintiff's case. But the case may go elsewhere, and if it does I think the judges of the Courts above are entitled to know what view the judge who tried the case took of the facts of it.

Were misrepresentations in fact made to the plaintiff by Waithman, which he relied on, which were material, and which led to this contract? The onus of proving that is upon the plaintiff, and he has not discharged that onus to my satisfaction. I am not convinced that any material misrepresentation was made; certainly I am not satisfied that any misrepresentation, if made, was relied upon by the plaintiff, and induced him to apply for these shares.

Representations undoubtedly were made by Waithman to the plaintiff, but they were all verbal. There is a direct conflict of testimony between the plaintiff and Waithman on all the really material alleged misrepresentations, and there is no evidence before me except that of these two witnesses.

[His Lordship commented on the evidence, and proceeded as follows:—] I need not go through the alleged misrepresentations in detail, or further discuss the subject. I have stated the result upon my mind, which result is simply that the alleged misrepresentations are not established to my satisfaction.

Having decided the question of law, and expressed my opinion on the evidence on the questions of fact, I need not further deal with the point as to delay in bringing the action, or the other points which have been discussed.

It follows that the action fails and must be dismissed with costs; and on the counter-claim there will be judgment for the defendants with costs.

Solicitors for plaintiff: *Bower, Cotton & Bower.*
Solicitors for defendants: *Bloxam, Ellison & Co.*

F. E.

GREAT NORTHERN RAILWAY COMPANY *v.* COAL CO-OPERATIVE SOCIETY.

VAUGHAN WILLIAMS J.

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Nov. 8.

[1894 G. 807.]

Industrial and Provident Societies—Debentures—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

Debentures issued by a society registered under the Industrial and Provident Societies Acts, and charging the society's personal chattels by way of security for the payment of money, are not exempted by s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882, from the statutory requirements in respect of bills of sale.

In re Standard Manufacturing Co. ([1891] 1 Ch. 627) distinguished.

THE Coal Co-operative Society, Limited, was formed and registered under the Industrial and Provident Societies Act, 1862, and at the time when the debenture mentioned below was issued it was subject to the provisions of the Industrial and Provident Societies Act, 1876.

The rules of the society purported to authorize its committee to borrow, in the name or otherwise on behalf of the society, such sums of money as they might from time to time think expedient, by bonds or debentures, or in such other manner as they might deem best.

By an indenture dated June 13, 1893, and made between the society of the first part, the Great Northern Railway Company of the second part, the Midland Railway Company of the third part, and the London and North Western Railway Company of the fourth part After reciting that the society was indebted to the railway companies in certain specified sums, and to certain persons and companies named in the first schedule in the sums set opposite their names And reciting that the companies and persons had required payment, and that the society had asked for time, and as an inducement thereto had agreed to secure payment of the debts with interest by the issue to the companies and persons of debentures framed in accordance with the form in the second schedule, and to give the companies such security as was thereinafter contained. The society covenanted with

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the companies, and each of them, to pay on June 1, 1894, the principal sums owing to them with interest in the meantime. And the society thereby charged with payment of the moneys and interest thereinbefore covenanted to be paid all its freehold, copyhold, and leasehold hereditaments, and the goodwill of its business, and all its capital, stock and goods, chattels, and all other its property, both present and future, including its uncalled capital for the time being. And the deed provided that the charges made thereby and by the debentures were all to rank pari passu in proportion to the principal sums secured as a first charge on the property charged without any preference or priority one over another, and that such charge was to be a floating security, but so that the society should not be at liberty to create any mortgage upon any of its property in priority to the said security, or to sell or assign any of its freehold, copyhold, or leasehold hereditaments.

The deed also provided that if all interest payable thereunder to the companies parties thereto should be duly paid on or within fourteen days after the day of its becoming due, and no covenant therein expressly or by implication contained therein should be broken, then the specific sum due to the companies or any part thereof should not be demanded or enforced before June 1, 1894, unless in the meantime an order should be made or an effective resolution passed for winding up the society.

The form of debenture in schedule 2 to the deed contained covenants for payment of principal and interest, and a charge by the society with payment thereof, on all its freehold, copyhold, and leasehold hereditaments, and the goodwill of its business, and all its capital, stock and goods, chattels and effects, and all other its property both present and future, including its uncalled capital for the time being.

The conditions of each debenture stated that it was one of a series of debentures for securing principal sums amounting, together with principal sums secured by the indenture, to the total sum of 15,695*l.* 1*s.* 3*d.* issued, or about to be issued, by the society; that the charges created by the debentures and indenture were all to rank pari passu in proportion to the principal sums secured by the debentures and indenture

respectively as a first charge on the property thereby charged without any preference or priority one over another; that such charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon any of its property in priority to the said security or to sell or assign any of its freehold, copyhold, or leasehold hereditaments; and that the principal moneys should immediately become payable if the society should make default for fourteen days in payment of any interest thereby secured, and the holder thereof before such interest should be paid by notice in writing to the society should call in such principal moneys, or if an order should be made or effective resolution passed for the winding up of the company.

An action was, in 1894, brought by the three railway companies (on behalf of themselves and all other persons entitled to the benefit of the indenture and debentures) against the society for realization of the security.

On May 5, 1894, on motion for judgment Kekewich J. directed certain accounts and inquiries to be taken and made.

An order having been shortly afterwards made for the winding up of the society, the action was transferred to Vaughan Williams J., and the Registrar, in his certificate in answer to the inquiries, reserved for the consideration of the Court the question whether the indenture and debentures created a valid charge or security on the property of the society other than its freehold, copyhold, and leasehold hereditaments owing to the fact that the deed and debentures had not been registered as bills of sale.

Buckley, Q.C., and *A. à Beckett Terrell*, for the plaintiffs. The question is whether debentures given by a society registered under the Industrial and Provident Societies Acts are "debentures issued by any mortgage, loan, or other incorporated company" within the meaning of s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882.

It will be contended that "incorporated company" means a company incorporated under the Companies Act, 1862, and not otherwise; but there is no such limitation in the section.

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The society was formed under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), under s. 5 of which on the certificate of registration being obtained the society becomes a body corporate having a perpetual succession, a common seal, and limited liability.

The Act of 1862 was repealed by s. 4 of the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45); but by s. 5 of the later Act every incorporated society then subsisting under any Act relating to industrial and provident societies was to be "deemed to be a society registered under this Act." By s. 7 the word "limited" is to be the last word in the name of the society; and by s. 11, sub-s. 1, registration renders the society a body corporate, with perpetual succession, a common seal, and limited liability. The Act of 1876 has since been repealed by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), but was in force when the debentures were given by the society. Societies of this kind are certainly corporations; they are empowered to carry on any trade (see s. 6 of the Act of 1876), and are in everything but name trading companies. That being so, debentures issued by them are by s. 17 of the Bills of Sale Act, 1882, exempted from the operation of the Bills of Sale Acts: *In re Standard Manufacturing Co.* (1) The Bills of Sale Acts were not framed for the benefit of liquidators: *In re Marine Mansions Co.* (2)

[They also referred to Buckley on Companies, 6th ed. p. 272.]

Levett, Q.C., and *E. C. Macnaghten*, for the liquidator of the society. The debentures are not protected by s. 17 of the Act of 1882. That provision only extends to "Mortgage, loan, or other incorporated companies," and the Legislature meant to distinguish between a company and a society. Limited companies under the Companies Act, 1862, are by s. 43 of that Act bound to keep a register of mortgages, which is open to inspection by creditors and members, and that is the ratio decidendi of the judgment in *In re Standard Manufacturing Co.* (1) But societies like this are not bound to keep any register of mortgages.

(1) [1891] 1 Ch. 627. (2) L. R. 4 Eq. 601.

Under the Act of 1876 a distinct set of provisions was applicable in the case of a society being wound up (s. 17).

[VAUGHAN WILLIAMS J. Are these societies limited companies within the Companies Act, 1862?]

No; there is an express provision in s. 54 of the Act of 1893 that a registered society may "convert itself into a company under the Companies Acts," and by s. 55 a company under those Acts may "convert itself into a registered society."

[VAUGHAN WILLIAMS J. referred to s. 199 of the Companies Act, 1862.]

Where the Legislature intends to refer to these societies in statutory provisions it refers to them specifically and distinguishes between them and companies: Forged Transfers Act, 1891, ss. 2, 3; Married Women's Property Act, 1882, ss. 6–10.

[They also referred to Buckley on Companies, 6th ed. pp. 169, 433.]

Buckley, Q.C., in reply. Even the Bills of Sale Act, 1878, does not apply to the debentures of an incorporated company. They never were within the Acts, and if they had been, s. 17 of the Act of 1882 would have taken them out of the Acts: *Read* v. *Joannon*. (1) That view was not based on the ground that there were statutory provisions that certain companies should keep a register of securities given by them—any company may register its mortgages—and yet that view was agreed to by the Court of Appeal in *In re Standard Manufacturing Co.* (2) [He also referred to ss. 4, 10, 12 of the Bills of Sale Act, 1878.]

Levett, Q.C., in reply, on the further authorities cited. The definition of a bill of sale in s. 4 of the Act of 1878 is wide enough to include a debenture. *In re Marine Mansions Co.* (3) was decided before the Act of 1882 was passed. That Act, in the case of securities for money, has a wider scope than the previous Bills of Sale Acts, and the liquidator and those whom he represents are within its protection. Pearson J. considered bills of sale—and we say a debenture is a bill of sale—given by joint stock companies to be within the Act of 1882: *Attenborough's Case*. (4) [He also referred to the Bills of Sale Act,

(1) 25 Q. B. D. 300, 303.
(2) [1891] 1 Ch. 627.
(3) L. R. 4 Eq. 601.
(4) 28 Ch. D. 682.

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1878, s. 8: *Jenkinson* v. *Brandley Mining Co.* (1), and *In re Stockton Iron Furnace Co.* (2)]

VAUGHAN WILLIAMS J. The question in this case is as to the validity, as against the liquidator, of certain debentures issued by the society; and, so far as I can see, there is no direct authority on the point.

The first Bills of Sale Act, that of 1854 (17 & 18 Vict. c. 36), was passed with a specific object which is stated in the preamble. The statute is intituled "An Act for preventing frauds upon creditors by secret bills of sale of personal chattels," and it begins with a recital that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors."

The Act, being passed with that object, is made to apply only in favour of certain specified persons, those persons being really execution creditors, assignees in bankruptcy, and trustees under deeds of assignment for the benefit of creditors generally.

The Act of 1854 was repealed by the Bills of Sale Act, 1878; but, as far as I understand, the Act of 1878 was passed with the same object and for the protection of the same classes as the Act of 1854. Both statutes were passed to prevent the same mischief—that is, frauds upon creditors—and for the protection of the same persons—that is to say, either individual creditors who had obtained judgment and issued execution, or creditors generally who had obtained execution in the shape of a bankruptcy. There is nothing, however, in the Act of Parliament which indicates an intention to afford any special protection to liquidators of companies.

The Bills of Sale Act (1878) Amendment Act, 1882, has a very much wider scope than either of the previous Acts. It is intended not only for the prevention of frauds upon creditors, but also for the protection of debtors and those who are in need

(1) 19 Q. B. D. 568. (2) 10 Ch. D. 335.

against those who are apt to take advantage of their necessities, to prey upon them, and to defraud them; and this being so it is a natural consequence that one should find that the Act of 1882 applies not only—as the Acts of 1854 and 1878 did—to a case where the grantor remained in possession of the property notwithstanding the bill of sale, but also in the case of bills of sale, grants, and charges which are given either absolutely or as security for debts or advances, and to cases where the grantee may be in actual possession. That being the short history of the Acts of Parliament, one finds in s. 17 of the Act of 1882 the provision upon which so much has been said to-day. That section is as follows: "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

Those who have argued on behalf of the debenture-holders contend, in the first place, that the Bills of Sale Acts, whether you take the two earlier Acts, or the later Act of 1882, have no application whatever to bills of sale and similar instruments issued by corporations. They say that the two earlier Acts did not apply to corporations at all, and that the effect of the Act of 1882 (which has to be construed with the Act of 1878—which is still in force, the Act of 1854 having been repealed) is that not only does the Act of 1882 itself not apply to bills of sale or debentures issued by companies, but that the Act of 1878, which has to be read with the Act of 1882 as one Act, can no longer apply, if it ever did apply, to debentures issued by corporations or incorporated companies. And it is claimed by those who hold these debentures that they hold debentures issued by an "incorporated company" within the meaning of s. 17 of the Act of 1882. On the other hand, it is argued, on behalf of the liquidator, that the Acts of 1854 and 1878 did apply, and that the Act of 1878 does still apply to debentures, bills of sale, or charges issued by corporations or companies, and that whatever the effect of s. 17 of the Act of 1882 may be with reference to the debentures of an incorporated company, the present society is not an incorporated company within the meaning of that section, and that the result is that under the older Acts and the

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later Act the debentures remain subject to the provisions of the Bills of Sale Acts generally.

A good deal of light is thrown upon these contentions by *In re Standard Manufacturing Co.* (1) Bowen L.J. undoubtedly says that the judgment of the Court of Appeal is based upon the ground that mortgages or charges of any incorporated company, for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878. Now, if that is the whole of the decision of the Court of Appeal, I hold that this society is not entitled to the benefit of that decision, and does not come within the scope of it at all. This society is not a company for the registration of the mortgages or charges of which separate provision is made by any Act of Parliament, and the result is that these debenture-holders cannot rely on *In re Standard Manufacturing Co.* (1) as shewing that they are exempted from the provisions of the Bills of Sale Act. That being so, I have to look at the 17th section myself, and see whether these debentures come within it, and I hold that they do not. I should prefer to base my decision on the simple ground that s. 17 excludes companies from the operation of the Act of 1882, and that this is not a company, but a corporation which bears the name of a society. The word "company" has come to have a very well recognised meaning. There are various legal companies, but this industrial society does not come within the connotation of that word in any of its accepted legal meanings. And I think that that alone would be sufficient ground for saying that the section was designed by the Legislature in favour of companies, and that if the Legislature had intended to exclude from the operation of the Bills of Sale Act all sorts of corporations, nothing would have been easier for the Legislature to do than to say so in plain terms.

But although I think that is a sufficient ground, I should like to add as a further ground that it seems to me that the Legislature may very well have drawn the line between companies in respect of which there is a statutory provision as to registration

(1) [1891] 1 Ch. 627.

of securities, and corporations in respect of which there is no such provision. But it is my duty to look at the judgment of the Court of Appeal, delivered by Bowen L.J., in *In re Standard Manufacturing Co.* (1), and to see whether there is anything in it, besides what I have stated, which is either binding upon me, or which, even though it may not be binding upon me, I should wish to follow out of deference to Bowen L.J. There appears to be nothing that is binding upon me. In that case the question was distinctly raised: "Aye or no; are corporations generally bound by the Bills of Sale Acts, irrespective of the effect of s. 17 of the Act of 1882"? Bowen L.J. looks at the Bills of Sale Acts, and he points out that bills of sale, or charges, or debentures issued by companies do not, in his opinion, come within the mischief aimed at by these Acts of Parliament. He also points out that much of the language of the Acts is not apt language to use if the statutes were intended to apply to corporations, but at the same time he takes the definition clause—s. 3 of the Act of 1878, which does not materially differ for this purpose from the definition clause in the Act of 1854—and says in terms that the words of that clause may be wide enough to cover a bill of sale or a debenture issued by a company. Having done that, what does he do? Having placed, as it were, the matters *pro* and the matters *contra*, he says that the Court does not go "so far as to decide that no corporation can be under any circumstances within the Bills of Sale Act, 1878." It seems to me, therefore, that in the judgment delivered by Bowen L.J. the Court of Appeal deliberately and studiously leave that question open. Then he says (2): "The view that debentures like the present are not within the Bills of Sale Act of 1878 was that adopted by Pollock B. in the case of *John Welsted & Co.* v. *Swansea Bank* (3), and by Lord Coleridge and Wills J. in the case of *Read* v. *Joannon* (4): see also *Edmonds* v. *Blaina Furnaces Co.* (5) and *Levy* v. *Abercorris Slate and Slab Co.* (6) We agree with this view"—that is, the view adopted in these cases—"and we think that this appeal should, therefore, be

(1) [1891] 1 Ch. 627, 644.
(2) Ibid. 647.
(3) 5 Times L. R. 332.
(4) 25 Q. B. D. 300, 302.
(5) 36 Ch. D. 215.
(6) 37 Ch. D. 260.

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allowed with costs both here and below." If he had stopped there I should have felt that that was such an affirmation of the view contained in those cases that it bound me, but he continues: "On the ground that the mortgages or charges of any incorporated company, for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act of 1878." That is to say, he does not exclude companies generally from these Acts of Parliament, but excludes only companies for the registration of the mortgages of which provisions have been made.

It seems to me, therefore, that in the judgment delivered by Bowen L.J., the question whether the Bills of Sale Acts apply to other companies, that is, companies in the case of which no provision has been made for registration, is deliberately left open.

Being at large to deal with the question, I cannot help starting with the Act of 1854, and remembering that when it was passed, the provision for registration of mortgages now contained in the Companies Act, 1862, was not in existence, and that whatever may have been the intention of the Legislature in 1854 with regard to companies coming within the provisions of the Companies Clauses Act, 1845, the Legislature could not have had any intention with reference to companies under the Companies Act, 1862. But with regard to those companies it does seem to me that the judgment delivered by Bowen L.J. is impossible to reconcile with *Deffell* v. *White* (1) and *Shears* v. *Jacob* (2), in both of which it was held in the year 1866 that the Bills of Sale Act, 1854, did apply to companies under the Companies Act, 1862.

With regard to the residue of authority there is some each way. In *Attenborough's Case* (3) Pearson J. expressed the opinion that bills of sale given by joint stock companies were within the Bills of Sale Acts, but whether that is a decision or merely an expression, it is the expression of a very decided opinion. On one side there is that authority, to which should

(1) L. R. 2 C. P. 144. (2) L. R. 1 C. P. 513.
(3) 28 Ch. D. 682.

be added *Ross* v. *Army and Navy Hotel Co.* (1), in which Kay J. and the Court of Appeal both seemed to assume that companies under the Companies Act, 1862, were within the Bills of Sale Acts. It is true they did not there avoid the security, but the decision was not based upon the ground that the Bills of Sale Acts had no application to such companies.

On the other hand, there is *Read* v. *Joannon* (2), in which Lord Coleridge C.J. and Wills J. expressly decided that debentures of limited companies were outside the Bills of Sale Acts, and there are the other cases which are mentioned by Bowen L.J. in *In re Standard Manufacturing Co.* (3), which, without at all expressly so deciding, seem to me to assume that the Bills of Sale Act has no application to corporations at all.

I think it right to mention here the point that Mr. Levett made, and it seemed to me justly made, that it is impossible to suppose that the Court of Appeal in *In re Standard Manufacturing Co.* (3) meant to decide the case upon the ground that the Bills of Sale Acts had no application to companies at all, because if a decision to that effect had been intended, the elaborate grounds stated by Bowen L.J. would not have been at all necessary, for he would only have had to say: "This point is concluded by *Read* v. *Joannon* (2), with which we agree."

I think I have now been through the authorities on this point. There is the judgment of the Court of Appeal delivered by Bowen L.J. in *In re Standard Manufacturing Co.* (3), which decides that companies for the registration of the mortgages of which provision is made are not within the Act of 1878, and I am asked to go a step further and say that no corporations are within the Bills of Sale Acts. I do not feel disposed to go that step. What would most dispose me to do so is the fact that although a Bills of Sale Act had been in force ever since 1854, there had not been since *Deffell* v. *White* (4) and *Shears* v. *Jacob* (5), down to 1882, any decision avoiding debentures as coming within the Bills of Sale Act. The reason of that is

(1) 34 Ch. D. 43.
(2) 25 Q. B. D. 300, 302.
(3) [1891] 1 Ch. 627.
(4) L. R. 2 C. P. 144.
(5) L. R. 1 C. P. 513.

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that the question could not very often arise because, as Lord Hatherley points out in *In re Marine Mansions Co.* (1), the Act of 1854 had no operation in favour of liquidators, and, so far as execution creditors were concerned, the question very rarely arose, because the moment an execution was put in a winding-up order was applied for, and on that being obtained the raising of the question was avoided.

Under those circumstances I am disposed to hold that there is nothing in the Bills of Sale Acts generally or in s. 17 of the Act of 1882 which excludes from the operation of the Bills of Sale Acts debentures issued by an industrial society like the present, and I therefore decide in favour of the liquidator.

Solicitors: *W. Barrs; Bower, Cotton & Bower.*

(1) L. R. 4 Eq. 601, 610.

F. E.

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Nov. 14, 25, 26, 28; Dec. 17.

[1890 M. 3191.]

Trustee—Breach of Trust—Solicitor—Agent—Solicitor becoming Constructive Trustee—Liability of Partner.

It is not within the scope of the implied authority of a solicitor carrying on business in partnership to constitute himself a constructive trustee, and thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established.

It having been held by North J. that a solicitor had constituted himself a constructive trustee, and that both he and his partner in business were liable to make good a loss which had resulted from improper investments of the trust funds :—

Held, by the Court of Appeal, upon the evidence, that in the matters in question the solicitor had acted only in the character of solicitor to the trustees, and that consequently neither he nor his partner were liable as constructive trustees.

Decision of North J. ([1895] 2 Ch. 69) reversed.'

Appeal by the defendants against a decision of North J. (1), holding them jointly and severally liable to make good a loss which had resulted from improper investments of trust funds.

The defendants Hugh Browne and Arthur Browne were brothers, carrying on business as solicitors in partnership. North J. held that Hugh Browne had so acted as to constitute himself a constructive trustee, or trustee de son tort, and that his partner was liable for his acts.

The following statement of the facts is taken from the written judgment of A. L. Smith L.J. :—

By a marriage settlement dated August 30, 1875, made in contemplation of the marriage of Harold Reeves with his future wife, then Miss Ellen Jane Walker (the now plaintiff, Mrs. Mara), the then present and after-acquired property of the wife, which together amounted to a little over 10,000*l*., was vested in two trustees (James Walker and Bernard Edwin James) in trust (so far as is material) for the wife for life, with remainder to the husband for life, with remainder to the issue of the

(1) [1895] 2 Ch. 69.

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marriage. Power was given to the trustees to invest the trust funds in (amongst other securities) leasehold securities in England, and power was also given to the husband and wife, or the survivor of them, to appoint new trustees. There were two children of the marriage, who were still infants, and were co-plaintiffs in this action by a next friend. The other plaintiffs were Arthur Reeves and Marian Reeves, the existing trustees of the settlement. The trust fund was managed by the trustee James, who was a Liverpool solicitor. In December, 1883, Mr. Harold Reeves and his wife became dissatisfied with the way in which the trust was being administered by James. The other trustee, Walker, had for some years taken hardly any part in the management of the trust, having left that to James. At this time (December, 1883) Harold Reeves consulted his brother Arthur Reeves, who afterwards became a trustee of the settlement, and thereupon they communicated with the defendant Hugh Browne, who was a solicitor at Nottingham in partnership with the other defendant Arthur Browne, in order that he might look into the affairs of the trust, which he accordingly did. Grave irregularities, to say the least, upon the part of James were then discovered by Hugh Browne: portions of the trust property were not forthcoming, documents supposed to be spurious were produced by James, and it became evident that the great thing to be done was, if possible, to get the trust funds which were not then forthcoming, replaced and made good by James. Walker was desirous of being relieved of the trust, which he had left to the management of James, and upon January 7 or 8, 1884 (the deed was not dated), Mr. and Mrs. Harold Reeves, under the power contained in the settlement, by deed appointed Arthur Reeves to be a trustee in the place of Walker, who thenceforth took no further part in the management of the trust. This deed was duly executed by Harold Reeves and his wife. It was not executed by Walker or by Arthur Reeves; but the latter at once entered upon the management of the trust, and took an active part therein. Hugh Browne, at the instance of Mr. and Mrs. Harold Reeves and of Arthur Reeves, thereupon set to work to press James to make good the deficiencies in the trust funds, and, as North J. said: "it is doubtful

whether any one could have been found who would have shewn so much tact and have managed the matter with so much success" as Hugh Browne did. James was induced by Hugh Browne to make good the deficiencies, and between January, 1884, and May 9, 1884, James with this object made payments into an account opened at Messrs. Yates' Bank, at Liverpool, in the joint names of himself and Arthur Reeves. James agreed that he should retire from the trust when he had fully recouped the trust fund, and all deficiencies were made good by him by May 9, 1884. It was also arranged that Miss Marian Reeves, a sister of Harold and Arthur Reeves, should become trustee in the place of James when he retired; and on May 9, 1884, a deed appointing her trustee of the settlement in conjunction with her brother Arthur was executed. Between January, 1884, and May 9, 1884, the moneys paid by James into the joint account at Yates' Bank became available for the trust, they having been paid into the joint account by James for that purpose. Harold Reeves and his wife were anxious that this money should be invested, and not lie idle, and that, if possible, 5 per cent. interest should be obtained for it; and they and Arthur Reeves agreed that Hugh Browne should look out for investments upon mortgage for the moneys as they were paid by James into the joint account. James was well aware that these moneys were being invested by Hugh Browne on behalf of the trust, and, in order that this might be done, he, in conjunction with Arthur Reeves, from time to time drew cheques upon the account in favour of Hugh Browne, who passed the money so received into his private banking account, and thereout advanced it to the different mortgagors as the buildings on their properties progressed. It appeared from the correspondence that all that was done by Hugh Browne in these matters had the sanction and approval of Mr. and Mrs. Harold Reeves, and of Arthur Reeves, who were kept fully informed of what was going on and the investments which were being made. James knew that investments were being made for the trust by Hugh Browne out of the moneys which he had paid into the joint account, and he was content that this should be done, though it would seem that, as regards the actual investments, he was

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willing to leave this, and did leave it, to Arthur Reeves and Mr. and Mrs. Harold Reeves, and did not care to inquire into it.

The defendant *Hugh Browne* in person. In making the investments of which the plaintiffs complain, I acted not as a constructive trustee, but only as the agent of the then existing trustees, James and Arthur Reeves. The latter had been duly appointed a trustee in January, 1884, and was acting as such in conjunction with James. I am not, therefore, responsible for the loss which has resulted, even if the securities in question were improper ones.

Swinfen Eady, *Q.C.*, and *Boome*, for the defendant Arthur Browne. Hugh Browne was not a constructive trustee, and a fortiori Arthur Browne was not: *Barnes* v. *Addy*. (1) If Hugh Browne made himself a constructive trustee he was not in so doing acting within the scope of his authority as a partner, and therefore Arthur Browne is not liable for what he did. A solicitor who acts for a trustee is not liable for a breach of trust committed by his client: *Robertson* v. *Armstrong* (2); *In re Spencer*. (3) There were existing trustees for whom Hugh Browne was acting as agent. *Soar* v. *Ashwell* (4) and *Blyth* v. *Fladgate* (5) were different cases. No money passed through the hands of Arthur Browne: *In re Barney*. (6)

[With regard to the operation of the Statute of Limitations, and the consent of Mrs. Mara to the investments complained of, they were stopped by the Court.]

Cozens-Hardy, *Q.C.*, and *C. E. E. Jenkins*, for the plaintiffs. It is not disputed that the mortgages complained of were improper investments, and that breaches of trust were committed. Hugh Browne made the investments on his own responsibility without any directions from James or Walker. He does not shew that the trustees (if there were any then) assented to the securities. He received the trust money and applied it partly in repaying what he had himself already advanced to the mort-

(1) L. R. 9 Ch. 244.
(2) 28 Beav. 123.
(3) 51 L. J. (Ch.) 271.
(4) [1893] 2 Q. B. 390.
(5) [1891] 1 Ch. 337.
(6) [1892] 2 Ch. 265.

gagors. There were no actual trustees at the time, and he became a constructive trustee or trustee de son tort. At any rate, he does not shew that he had authority from both the trustees. A receipt by one trustee is not a good discharge: *Lee* v. *Sankey*. (1) A solicitor who obtains possession of trust money ceases to be a mere agent, and becomes accountable as a trustee: *Morgan* v. *Stephens* (2); *Brinsden* v. *Williams* (3); *Attorney-General* v. *Corporation of Leicester*. (4)

[LORD HERSCHELL referred to *Fyler* v. *Fyler*. (5)]

If Hugh Browne is responsible for the breaches of trust his partner is also responsible. There is evidence that the firm often undertook to receive and invest money of their clients. The firm charged and received costs in relation to the transactions: *Rhodes* v. *Moules* (6); *Moore* v. *Knight*. (7) There can be no ratification of a breach of trust; a ratification would itself be a breach of trust.

Swinfen Eady, Q.C., in reply. There were duly constituted trustees at the time when the securities were taken, and Hugh Browne only acted as their solicitor. There was nothing to prevent Arthur and Marian Reeves from ratifying what had been done: *Foster* v. *Bates* (8); *Hill* v. *Curtis*. (9) James in fact directed the making of the investments. An appointment of a new trustee by writing was sufficient, and Arthur Reeves was thus duly appointed in January, 1884, in place of Walker.

Cozens-Hardy, Q.C., for the plaintiffs. The appointment of January, 1884, was not set up by the pleadings or relied upon in the Court below. It was merely a conditional appointment, and was executed as an escrow.

Cur. adv. vult.

1895. Dec. 17. LORD HERSCHELL read the following judgment:—On August 30, 1875, a settlement was executed on the marriage of Mrs. Mara (then Miss Ellen Jane Walker), one of the plaintiffs in this action, with her first husband, Harold Reeves.

(1) L. R. 15 Eq. 204.
(2) 3 Giff. 226.
(3) [1894] 3 Ch. 185.
(4) 7 Beav. 176.
(5) 3 Beav. 550.
(6) [1895] 1 Ch. 236.
(7) [1891] 1 Ch. 547.
(8) 12 M. & W. 226.
(9) L. R. 1 Eq. 90.

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The trustees of this settlement were James Walker and Bernard Edwin James. The latter was a solicitor, and his co-trustee left the management of the trust property almost entirely to him. Towards the end of the year 1883 Harold Reeves consulted the defendant Hugh Browne as to the course that should be taken, as Mr. and Mrs. Reeves entertained grave doubts as to the safety of the trust investments. The amount invested on these securities exceeded 10,000*l.* The defendant Hugh Browne was a friend of Harold Reeves, and was in practice as a solicitor in Nottingham in partnership with his brother Arthur Browne, the other defendant. It was in consequence arranged that Walker should retire from the trust, and that the plaintiff Arthur Reeves should become a trustee in his stead. To this all parties, Mr. and Mrs. Harold Reeves, Walker, and Arthur Reeves, assented. Accordingly a deed was prepared, by which Mr. and Mrs. Reeves, in whom the power of appointment was vested, appointed Arthur Reeves as trustee in the place of Walker. This deed was executed by Mr. and Mrs. Reeves about January 7 or 8, 1884. It was not executed by Arthur Reeves. On January 11 a meeting took place between Hugh Browne and James, which left upon the mind of Hugh Browne the impression that the securities were not in order, and, indeed, that some of them were forgeries. James, however, expressed his willingness to take over the securities himself, and to pay the amount of the trust funds in cash, expressing himself willing to retire from the trust. A sum of 1405*l.* 15*s.* was at once forthcoming from James, and this was placed in the bank of Yates & Co. at Liverpool, to the credit of an account opened in the joint names of James and Arthur Reeves. I may state at once that various moneys were from time to time paid by James to the credit of this account until the whole of the trust funds for which he was responsible were accounted for. Some time in January, 1884, apparently soon after James had expressed his willingness to retire from the trust, it was arranged that Marian Reeves, a sister of Harold Reeves, should become trustee in his place. On May 9, 1884, a deed was duly executed by Mr. and Mrs. Reeves, as well as by the retiring and new trustees, by which Arthur Reeves and Marian Reeves were

appointed trustees in the place of Walker and James. The transactions for which it is sought to make the defendants responsible in the present action all took place between the previous month of January and the date of that deed. The defendant Hugh Browne was undoubtedly asked by Harold Reeves, with the full knowledge of Arthur Reeves, to look out for investments by way of mortgage, to which the moneys paid in by James to the bank in Liverpool could be applied. Mr. and Mrs. Reeves were naturally anxious that the money should begin bearing interest as soon as possible. Hugh Browne accordingly suggested a series of investments. I do not differ from the learned judge who tried the case in the conclusion that the investments were not proper ones for trustees to make. The money was to be lent upon building property of a speculative character, and the margin was not satisfactory. If the action had been one charging the defendants with negligence as solicitors, with a view to make them responsible for such loss as the trust estate had sustained owing to the investments made, it may well be that there would have been no answer to the action had it been brought in due time; but any such claim is now barred by the Statute of Limitations. The case sought to be made against the defendants is that their liability is the same as if they had been the appointed trustees of these trust funds, and bound as such to see, not only that the investments were within the terms of the investment clause, but that they were of a proper nature. The learned judge in the Court below held that the plaintiffs had established their case. "The moneys," he said, "laid out by him" (Hugh Browne) "while there were no trustees were advanced upon his own responsibility, he being a principal in the matter, and not a mere agent for persons under whose lawful directions he was acting." I find myself quite unable to take this view of the facts.

It becomes necessary now to advert more particularly to the manner in which the trust funds came into the hands of Hugh Browne. In each specific case the particulars of the investment which Hugh Browne had to propose were communicated to Arthur Reeves, and a cheque was drawn for the purpose of being applied to that particular investment,

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the cheque being signed by both Arthur Reeves and James, in whose names the banking account stood, and the money, when so received by Hugh Browne, was paid over to the intended mortgagors. It is true that in two instances Hugh Browne had himself advanced a portion of the sum which the mortgagor required, and of course paid over to the intending mortgagor the balance only, and that he sometimes delayed paying a portion of the sum agreed to be advanced until the mortgagor had proceeded further with the buildings he was erecting; but I do not think these circumstances make any difference. The moneys sent by Arthur Reeves and James were in every case applied to obtaining the investments for the purpose of which they were sent. James, indeed, probably was not made aware, as Arthur Reeves was, of the particulars of the proposed investments, and perhaps did not trouble himself about them, but he undoubtedly knew that the money was being sent for investment on mortgage securities which had been offered, since that very circumstance was employed as a means of putting pressure upon him to complete as speedily as possible payment into the bank of the full value of the trust estate. It was conceded by Mr. Cozens-Hardy, in his argument for the respondents, that, if the transactions now impeached had taken place after the date of the deed of appointment of May, 1884, he could not have maintained that the defendant Hugh Browne was to be regarded as a constructive trustee. North J. appears to have taken the same view, for he refused relief in respect of advances made when the trusteeship was, as he said, full. In my opinion the distinction made is not a sound one. I do not think that it is correct to say that prior to that date there were no trustees. It appears to me that from the date, at all events, when the account was opened in the names of Arthur Reeves and James, down to the appointment by deed in the May following, those two gentlemen were the trustees of the settlement. It may be quite true that, when the circumstances of suspicion in relation to James's conduct became known to Arthur Reeves after January 11, he was unwilling to be joined with James as trustee, and that, if he had not intermeddled with the trust in any way, the deed

of appointment executed by Mr. and Mrs. Reeves would have been ineffectual. But, in the circumstances which actually occurred, I cannot treat that instrument as a mere nullity. Arthur Reeves actually became a joint recipient with James of the whole of the trust funds, and jointly with him disposed of them at a time when James, though he had expressed his willingness to retire, was still a trustee. It is admitted that Arthur Reeves by so doing subjected himself to the responsibilities of a trustee in respect of the trust fund. He became, it is said, a trustee de son tort. But does it not seem strange thus to designate him when he had, immediately before this, been appointed a trustee with his assent by those who were competent to make the appointment? It is surely more reasonable to refer his acts as trustee to this appointment than to treat them as tortious. In my opinion, therefore, the trusteeship was full during the period covered by the transactions in question as truly as it was after the subsequent 9th of May, and the learned counsel for the respondents made, in my opinion, no greater concession than he was compelled to make when he conceded that, if the money had come into Hugh Browne's hands from duly appointed trustees for application upon specific investments, his responsibility would have been that of a solicitor, and not of a trustee.

I think it right, however, to say that I am not satisfied that, even if Arthur Reeves is to be regarded as not having been duly appointed, the result would have been different. Hugh Browne was certainly not purporting or intending to act as trustee, nor was he supposed by any one to be so acting. He purported to act throughout as solicitor, and was understood by all parties to be so acting. Even conceding that he might in some circumstances, notwithstanding this, be held liable as a trustee, what are the circumstances here? James was undoubtedly a trustee, and Arthur Reeves, with the assent of Walker, the other trustee, and of those who had the power of appointing a new trustee, acted as such. Although James may not have troubled himself about the investments, I can entertain no doubt that both he and Arthur Reeves regarded and dealt with Hugh Browne as solicitor to the trust, and as such handed

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to him the trust funds to be applied to specific investments. Under circumstances such as these I am not, as at present advised, prepared to hold that Hugh Browne would be liable as a constructive trustee.

What I have already said is sufficient to dispose of the action. But I desire to add that, even if in the circumstances of this case Hugh Browne had been held liable as a trustee, I should still have come to the conclusion that the defendant Arthur Browne was not so liable. The only case against him is that, during the period covered by these transactions, he was in partnership as a solicitor with the other defendant. He took no part in them, and was ignorant of their nature. In my opinion, it is not within the scope of the implied authority of a partner in such a business that he should so act as to make himself a constructive trustee, and thereby subject his partner to the same liability. I think the appeal must be allowed, and the action be dismissed with costs.

A. L. SMITH L.J. read the following judgment:—In this case North J. has held two solicitors, Hugh and Arthur Browne, liable as constructive trustees to make good a loss which has accrued to a trust fund by reason of its having been invested in improper securities, and the question is whether either or both of these gentlemen are so liable. The plaintiffs are Mrs. Mara, who has a life interest in the trust funds, her two infant children, and the present trustees of the fund. No case is made against the defendants that they were liable to make good the loss by reason of negligence whilst acting as solicitors, and, had it been, the defendants would have had a good answer to such a claim, by either Mrs. Mara or the trustees, under the Statute of Limitations, for the investment of the trust funds, which is the subject-matter of complaint, took place as long ago as the months of February and March, 1884, and the writ in the action was not issued till November 7, 1890, and, as regards the infant plaintiffs, *Rae* v. *Meek* (1) shews that they could not maintain an action for negligence against the defendants, for the breach of duty, if it existed, was to the trustees

(1) 14 App. Cas. 558.

and not the beneficiaries. [His Lordship stated the facts as above, and continued :—]

North J. found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee—in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly does not per se render their solicitor so liable.

But it is said that the facts shew that there should be imputed to Hugh Browne the character of a trustee, or, in other words, that he was a trustee de son tort, and upon this ground the learned judge has held him liable. It is not contended on behalf of the plaintiffs that Hugh Browne has been guilty of any fraudulent or dishonest conduct to the injury of the cestuis que trust, nor, to use Lord Langdale's words in *Fyler* v. *Fyler* (1), did he, being a solicitor, "take advantage of his position to acquire a benefit for himself at the hazard, if not to the prejudice, of the trust"; but it was said that he had made himself a constructive trustee, which, so far as I know, is the same thing as a trustee de son tort. Now, what constitutes a trustee de son tort? It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong—i.e., a trustee de son tort, or, as it is also termed, a constructive trustee. Lord Selborne L.C. dealt with this question in *Barnes* v. *Addy*. (2) He said (3): "That responsibility" (i.e., of a trustee) "may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may

(1) 3 Beav. 560.
(2) L. R. 9 Ch. 244.
(3) L. R. 9 Ch. 251.

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disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees." And James L.J. added (1): "I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to cestuis que trust the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of cestuis que trust, or the good of the world, that those cases should be extended." In this, if I may respectfully say so, I entirely agree.

In the present case Hugh Browne never became possessed of the trust funds, excepting for the purpose of transferring them from the joint account at Messrs. Yates's to the mortgagors, which he faithfully carried out, and which he did with the sanction of James and of Arthur Reeves, who had been appointed trustee under the circumstances above mentioned; and no one can suggest any knowledge in Hugh Browne of a fraudulent design on the part of the trustees, for the simple reason that no such design in fact existed. In my judgment, the true inference to be drawn from the facts of this case is that Hugh Browne between January, 1884, and May 9, 1884, acted as solicitor for James and Arthur Reeves, and that he never assumed to act otherwise, that he never intended to act otherwise, and that, in truth, he never did act otherwise. Mr. Cozens-Hardy, on behalf of the plaintiffs, admitted, and I think that his admission was well founded, that if the deed of May 9, 1884, appointing Arthur Reeves and his sister Marian trustees, had been executed in January, 1884, he could not have contended that Hugh Browne was acting otherwise than as solicitor to the trustees in what he did between January and May 9, 1884, for he would then have been acting for principals—i.e., for trustees—in transactions within their legal power; but he contended that, as the deed was not executed until May 9,

(1) L. R. 9 Ch. 255.

1884, Arthur Reeves up till then was at the most a mere trustee de son tort, and that James, although an undoubted trustee, was not permitting Hugh Browne to act for him, and consequently, Hugh Browne having no principals, he must be held to have been a principal himself, and, therefore, a trustee de son tort. But why is it to be said that Arthur Reeves between January and May 9, 1884, was merely a trustee de son tort? He had been appointed trustee by deed under seal in January, 1884, and he at once undertook the burden of the trust, and the impeached investments did not take place until afterwards —namely, between February 20, 1884, and March 14, 1884. In my judgment it is incorrect to hold that he was acting as trustee de son tort; why is this to be assumed? The learned judge came to the conclusion that Arthur Reeves never acted under the deed of January, 1884, and that it was abandoned; but why is this to be so held? We find Arthur Reeves after its execution at once entering upon the business of the trust; and why is it to be assumed and held that he then acted as a trustee in his own wrong rather than as a properly appointed trustee? I can draw no such inference. It is true that in 1890 Hugh Browne ran his pen through the signatures of Mr. and Mrs. Harold Reeves, lest, as he said, any person should mistake the deed for a living one; but this was many years after it was executed and at a time when it was no longer needed, for the deed of May 9 was all that was then required. The learned judge also held that Hugh Browne could not say that he was acting as solicitor for James, for he had treated him as a hostile party. But, with submission, although this was so at one time, the learned judge appears to me to have omitted to notice the part taken by James, as he made good the trust fund, in drawing the cheques in conjunction with Arthur Reeves upon their joint account with the express object that the moneys so obtained should be invested by Hugh Browne for the trust. Upon these questions of fact I find myself differing from the learned judge. In my opinion, between January, 1884, and May 9, 1884, it has been proved that Hugh Browne was acting for James and Arthur Reeves in making the investments, that they were the de facto trustees,

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and that he had them as principals, and that in what he did he was not, therefore, a trustee de son tort.

This suffices to determine this case; but, had Hugh Browne been acting as a trustee de son tort, I do not see how that circumstance would render Arthur Browne, his partner, liable for the consequences attaching to such a position. It is not, however, necessary to discuss this, nor the point, so much debated at the bar, as to what would have been Hugh Browne's position if he acted for James, who was an actual trustee, and Arthur Reeves, if he had been merely a trustee designated and not actually appointed. For these reasons I think that the appeal should be allowed with costs, and that the action must be dismissed with costs.

RIGBY L.J. read a judgment, in which (after stating the facts) he continued:—At what time the plaintiff Arthur Reeves first became aware of the payments made by James to the joint account in the names of himself and Arthur Reeves does not precisely appear; but he was sufficiently informed of them by a letter of January 29, 1884, and a letter of his own dated February 5, 1884, proves that he had himself obtained a copy of the bank account, shewing what payments had been made down to that time, and was acquiescing in further payments being made to the same account. Moreover, he operated upon the account by joining with James in drawing cheques in favour of the defendant Hugh Browne, for the express purpose of enabling the latter to invest the sums for which the cheques were drawn upon the leasehold securities complained of in the action.

In these and other matters he acted as a trustee of the settlement, and he was so treated by James, the other trustee.

It is true that after an interview on January 11, 1884, between Hugh Browne, Harold Reeves, and James, it became at once apparent that James could not remain a trustee, and that the plaintiff Arthur Reeves objected very naturally to have him as co-trustee; but before the middle of January it was arranged that he should retire, and that Marian Reeves should be appointed in his place to act jointly with Arthur Reeves. But this does not shew that Arthur Reeves was not acting as trustee

along with James, at any rate from February 5, and, if he were properly appointed, he could not after that date disclaim, even though his consent to act might in the first instance have been conditional only.

By the Conveyancing Act, 1881, s. 31, sub-s. 1, Mr. and Mrs. Reeves had power to appoint him by writing, and their execution of the deed of appointment on January 7 or 8, followed by his acceptance, operated as a valid appointment. By sub-s. 5 of the same section, "every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust."

Whatever was, at the time or afterwards, thought by the parties, Arthur Reeves and James were trustees in the interval between the acceptance of the trust by Arthur Reeves and the retirement of James which followed on May 9, 1884. It was during that interval that all the investments in respect of which relief has been granted were made; and the investments themselves, however improvident they may have been, were within the legal powers of the trustees. The defendant Hugh Browne in all that he did during the interval acted in the capacity of solicitor for one of the two trustees, whose directions as to investments were accepted or acted on by the other. The deed executed by Mr. and Mrs. Reeves on January 7 or 8, 1884, was very naturally left incomplete, in order that a deed suitable to the new state of things might be substituted for it; but its effect as an appointment in writing was not in the least altered. Under these circumstances it seems to me that Hugh Browne cannot be made liable as a constructive trustee, and it is too late to make him liable as solicitor. I do not think the circumstance of the appointment of Arthur Reeves and the effect of the deed executed by Mr. and Mrs. Reeves in January, 1884, as an appointment in writing under the Conveyancing Act, 1881, was so clearly brought before North J. as it was brought before us on the appeal. If it had been I do not think he would have arrived at a different conclusion of fact from that above stated.

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I gather from his judgment that he would, if satisfied of this fact, have dealt with the questions of law as this Court is now doing.

The conclusion of fact at which we have arrived renders it unnecessary to consider in detail the questions of law which might have arisen if Arthur Reeves had only been what was called in argument a "trustee designate." I wish, however, to reserve for future consideration, whenever it may arise, the question how far a solicitor, acting as solicitor for a de facto trustee, can be made liable as a constructive trustee merely by reason of a defect in title of his principal. I think also, with Lord Herschell, that it is not within the scope of a solicitor's business to constitute himself a constructive trustee, so as to bind his partner and make him also liable as a constructive trustee, although he is not aware of the dealings by which the constructive trust is established.

Solicitors: *Swann & Co.*; *Steadman, Van Praagh, Sims & Co.*

W. L. C. (1)

C. A. 1895 *Nov.* 19, 21.

SIMPSON *v.* MAYOR OF GODMANCHESTER.

[1894 S. 4420.]

Easement — Opening Locks on River — Prescription — Presumption of Lost Grant.

The defendant corporation, being the owners of a mill and of several low-lying lands, had for upwards of 200 years exercised an uninterrupted right to open in times of flood certain river locks now belonging to the plaintiff. By a deed of 1689 a predecessor of the plaintiff granted to the corporation the right that the miller, or other appointee of the corporation, should open the locks in question in times of flood:—

Held, (1.) that, apart from the deed, the corporation were, either by prescription or presumption of lost grant, entitled to the right as an easement, and that such easement would be presumed to have been granted in respect of the lands of the corporation affected by the exercise of the right; (2.) that the corporation were entitled under the deed in respect of the mill.

THIS was an appeal from a decision of Wright J.

The plaintiff was the owner of the Godmanchester, Houghton,

(1) This report was partly prepared by the late Mr. Ware and has been completed by Mr. Cabell.

and Hemingford Locks on the river Ouse; he was also the owner of certain navigation rights on this part of the river which he claimed under letters patent of December 11, 1638. The action was brought for an injunction to restrain the corporation of Godmanchester from entering upon the locks in question, and from forcing or keeping open the lock gates. The defendants claimed the right of opening these locks in times of flood. The defendants had long since established as against owners of mills a similar right to open the mill gates, and that right was not in question. From St. Neot's, above Godmanchester, to St. Ives, below it, the lands on the banks of the Ouse had always been subject to floods. The embankments or mill-dams of ancient mills dating from about 1280, one at Godmanchester, belonging to the corporation, and others at Houghton and Hemingford, lower down the river, belonging to other persons, increased the destructiveness of the floods by penning back the water. The plaintiff's locks were cut through the embankments of or near the mills, and did not, even when closed, increase the obstruction caused by the embankments, but when opened gave additional outlet to the waters. They were constructed, in a different form, about 1660, and reconstructed in their present form about 1834. From the time of living memory the defendants had without opposition and as of right opened them, or ordered the servants of the plaintiff's predecessors to open them, in times of flood.

In November, 1689, Henry Ashley, the younger, a predecessor in title of the plaintiff, had become entitled to an undivided moiety of the navigation rights and of the locks at Houghton and Hemingford.

By an indenture of December 3, 1689, made between the bailiffs, assistants, and commonalty of the borough of Godmanchester of the one part and Ashley of the other part, the site of the Godmanchester lock was, in consideration of 120*l.* paid by Ashley to the bailiffs, &c., of the borough of Godmanchester, granted to Ashley in fee, and by the same deed Ashley promised and granted to and with the said bailiffs, &c., of the said borough (inter alia) that it should be lawful for the miller of the said Godmanchester Mills for the time being, and in default

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or omission for such person or persons, officer or officers, as should be thereupon appointed by the bailiffs of Godmanchester for the time being for ever thereafter, upon every likelihood and appearance of any flood or outrage of water, to set open and keep open, or else to take off the gates of the aforesaid (Godmanchester) sluices, and also the gates of the sluices in and near Houghton, and also the gates of the sluices in and near the mill of Hemingford Grey, in the county of Huntingdon, and lay them upon the land by the side of the said sluices until the waters be fallen and the floods well abated.

In 1696 the owners of the other undivided moiety of the navigation rights and of the locks at Houghton and Hemingford, who were also predecessors of the plaintiff, obtained a decree establishing their right to participate in the benefit of this deed upon payment of half the purchase-money.

The defendants were and had been for 250 years the owners of the manor of Godmanchester, and of various lands and tenements adjacent to the River Ouse, including (inter alia) the Godmanchester Mill, a wharf, and certain low-lying lands, which were subject to common rights. Some of these properties were in the occupation of the defendants, and others were let out to tenants. By their last amended defence the defendants alleged that as such owners, both on their own behalf and on behalf of their tenants and the persons entitled to rights of common, they had for 250 years enjoyed without interruption the right of opening and keeping open the gates of the sluices or locks in question in times of flood, and they claimed such right or easement for the benefit of the borough of Godmanchester, and as a protection for their hereditaments, such right being claimed by virtue of the Prescription Act, 1832, and also under the indenture of December 3, 1689, or under some lost grant.

The user was established; but no evidence was offered to shew that the alleged right had been exercised in respect of any particular lands or tenements. Wright J. held that the grant in the deed of 1689 was bad as a grant of an easement in gross; but that the defendants' claim could be supported apart from that deed by prescription or by the fiction of a lost grant.

The plaintiff appealed.

E. R. Simpson, for the appellant. The covenant in the deed of 1689 is not binding on the plaintiff: *Austerberry* v. *Corporation of Oldham*. (1) Nor is the grant of the right to open the sluices valid as a grant of an easement, for it is not an easement. It is too indefinite and uncertain to constitute an easement, and is, moreover, destructive of the servient tenement: *Leech* v. *Schweder*. (2)

[LORD HERSCHELL referred to the definition of easement in Gale on Easements, Chap. I.

RIGBY L.J. referred to *Sampson* v. *Hoddinott*. (3)]

The corporation had no dominant tenement in this case. The easement cannot be legally vested in some person who is not the owner of the dominant tenement for the benefit of the person who is: Gale on Easements, 4th ed. p. 8; *Ackroyd* v. *Smith*. (4) The case of *Goodman* v. *Mayor of Saltash* (5), which may be relied upon by the other side, is not applicable to easements.

A lost grant cannot be presumed in this case, because the user by the defendants is accounted for by the deed of 1689, which is produced and relied on by the defendants: *Attorney-General* v. *Horner*. (6) *Philipps* v. *Halliday* (7) is distinguishable, because there the defendants did not rely upon the original grant. The user here is not shewn to be appurtenant to any particular tenement, and of those lands of the defendants which are affected by the floods the defendants are only in occupation of some. There can have been no exercise of the user as to the lands not in the occupation of the defendants: *Lord Rivers* v. *Adams* (8); *Blewett* v. *Tregonning* (9); *Hammerton* v. *Honey*. (10)

Even if the deed of 1689 operated as a grant of easement over Godmanchester Lock, it could not operate so as to affect Houghton and Hemingford Locks, because H. Ashley only

(1) 29 Ch. D. 750.
(2) L. R. 9 Ch. 463.
(3) 1 C. B. (N.S.) 590.
(4) 10 C. B. 164, 188.
(5) 7 App. Cas. 633.
(6) 14 Q. B. D. 245.
(7) [1891] A. C. 228.
(8) 3 Ex. D. 361.
(9) 3 Ad. & E. 554.
(10) 24 W. R. 603.

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owned one moiety of those locks, and one tenant in common cannot create an easement over the entirety: *Durham and Sunderland Ry. Co.* v. *Wawn* (1); *Powell* v. *Head* (2); *Nyberg* v. *Handelaar*. (3)

Crackanthorpe, Q.C., and *Method*, for the respondents, were stopped by the Court.

LORD HERSCHELL. I am of opinion that the judgment must be affirmed. So far back as living memory goes, and there is ground for inferring that it was for a period anterior to living memory, the corporation of Godmanchester have exercised the right in time of flood of raising certain sluices or locks which now belong to the plaintiff, who has recently become the owner of the navigation upon which those sluices or locks are situate. The plaintiff seeks to restrain the corporation from exercising the alleged right, and he asserts that they have no right to do that of which he complains. The law on this subject was laid down in the case of *Philipps* v. *Halliday* (4) in terms which were concurred in by the House of Lords. It was there stated to be a well settled principle of English law, that where there has been long continued possession and assertion of a right the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts should presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. That is the law to be applied to the present case.

Now, could the corporation have acquired the right to raise these sluice gates in any valid and lawful way? It seems to me that that is a question which admits of only one answer. It is said that they could not, because this alleged right is not an easement and could not be granted to them as an easement, and that it is a right which the law cannot recognise as having a possible existence. I am quite unable to see why not. It appears to me to be an easement within the definition of the term at the commencement of Mr. Gale's work on Easements, and I think that that is a perfectly correct definition. Ease-

(1) 3 Beav. 119.
(2) 12 Ch. D. 686.
(3) [1892] 2 Q. B. 202.
(4) [1891] A. C. 228.

ments may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognised, such as the class relating to watercourses, or light or air or otherwise. If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person that primâ facie is an easement. And I do not see any reason why there should not be a perfectly valid easement in this right to go upon the land of the owner of locks or sluices, and in times of flood raise those locks or sluices to let the water down for the benefit of the land of the person who exercises the right. Therefore, as to its being a possible easement there seems to be no difficulty.

Then we will suppose that there is no evidence to shew how that easement came into existence. Still it has been exercised, and it can have had a legal origin if the corporation are now and have been during the time that they have been exercising the right the owners and occupiers of lands which can be affected by the fact of these sluices being open or shut. If they have been such owners or occupiers, then those lands may be regarded as the dominant tenements in respect of which that easement was granted by the owner of the servient tenement, and it would be presumed that the grant was made in respect of such tenements owned or occupied by the corporation as would be affected by the exercise of the right. It is said that the corporation in some cases have been the owners and have not been the occupiers. To my mind that is quite immaterial. They are and have been throughout the occupiers of some of the lands. But if they had not been the occupiers, I know of no difficulty in the owner of a tenement taking the grant of a right to do an act upon the land of another which is beneficial to that tenement and exercising that right, though his tenants be all the time in occupation. I cannot see the difficulty which is supposed to exist by reason of the corporation being the owners and not being the occupiers. They exercise the right on behalf of the occupiers of the tenement. The tenement is benefited by the act done, whether the owner does it or the occupier does it. It is admitted that the owner might do it if

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by contract between him and the occupier he was to do it. And what the owner of the servient tenement has to do with the question of the relative arrangements between the owner and the occupier of the dominant tenement I am at a loss to see. Therefore, quite apart from any deed or grant, it appears to me that on the clearest principles of law this alleged right was capable of a legal origin, and therefore must be assumed to have had a legal origin.

But I am not satisfied that the right may not be rested upon the grant or deed of 1689, coupled with a lost grant which there seems to me to be every reason for presuming in the present case. That deed appears to me to constitute a grant to the corporation of Godmanchester, authorizing them, they being the owners of the mills, and authorizing their tenants, in case they did not do it themselves, as the owners of the mills to set open these sluices. I will not repeat what I have said about that being in the nature of an easement. It appears to me, upon the true construction of this indenture, that it amounts to a grant. That is the reasonable construction of the indenture, having regard to the nature of the right with which the parties were dealing. That, therefore, would be a grant of an easement in respect of the mill, because the language of the deed connects it with the subject-matter. The corporation have throughout been and still are the owners of this mill. There is no difficulty, therefore, in a grant to the owners of a mill, that they or their tenants may open these sluices for the benefit of the mill. There is the dominant tenement, the servient tenement, and an easement.

But it is said that at the time when this deed was made Ashley was the owner of an undivided moiety only of the two sluices other than Godmanchester, and that therefore he could not grant an easement to interfere with those sluices, being only the owner of an undivided moiety. It is not necessary to discuss that question. I will assume that the right could not be rested on this deed alone. But what took place? The owners of the other undivided moiety of these two other sluices insisted that this purchase of the Godmanchester sluice by Ashley must be taken to have been made on their behalf, and

held to enure for their benefit. There was litigation upon that, and it was ultimately so decided. Obviously, they could not with any propriety take the benefit of this deed without submitting to its burdens, one of the burdens being that over these sluices, or in respect of these sluices in which they had an undivided moiety, a certain easement was created. Whether that of itself would have been enough to complete the title to the easement it is not necessary to inquire. It seems to me that if a grant was necessary to complete the title, the grant ought to be presumed, seeing that the right has been exercised during this lengthened period. I am assuming now that it has been exercised in conformity with this deed. I see no difficulty in presuming the existence of such a grant. It seems to me a presumption which ought to be made if it be necessary to establish the title of the defendant, founded as it is upon its long continued user.

Therefore, if the user be not referable to the deed, there appears to me to be ample support; if the user be referable to the deed, it appears to me to be equally well founded in point of law; so that whether the right was exercised under the deed or not under the deed it is totally immaterial to inquire. In each case it has a legal foundation to rest upon, and a legal foundation to which effect ought to be given in accordance with well established principles. For these reasons, I think that the appeal must be dismissed with costs both here and below.

A. L. SMITH L.J. I entirely agree, and on the same grounds as my learned brother has stated.

RIGBY L.J. I also agree, and I have nothing to add.

E. R. Simpson. The right exercised by the defendants would be different whether the Court decided it to be connected with Godmanchester Mill alone or with all the hereditaments. Unless the plaintiff knows in respect of which tenements the right exists, he cannot see whether it is properly exercised. If exercisable for the benefit of the mill alone, the defendants would not have the right to open the locks for some considerable

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time later than they would if it were exercisable for the benefit of all the hereditaments. The plaintiff cannot tell whether there will be an excess until he knows in respect of what the right is to be exercised.

LORD HERSCHELL. We do not decide that question one way or the other. It does not arise in the present case. The plaintiff asserted that the defendants had no right to open these sluices. His claim was not founded upon any question of mere excess. Therefore, we cannot determine that question now. All that we can say is that the action is ill-founded.

Appeal dismissed.

Solicitors for appellant: *Batten, Proffitt & Scott.*

Solicitors for respondents: *Grubbe & Co., for Hunnybun & Sons, Huntingdon.*

M. W. (1)

C. A. 1895 Dec. 4, 5.

In re JONES.

Solicitor and Client—Costs—Taxation—Agreement—Jurisdiction to set aside—Business in Police Court and at Quarter Sessions—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.

The jurisdiction under s. 8 of the Attorneys and Solicitors Act, 1870, to set aside an agreement between a solicitor and his client as to costs relating to business done by the solicitor in a police court or at quarter sessions is in the High Court.

Neither a police court nor quarter sessions is a "Court" within the meaning of s. 8.

Decision of Stirling J. ([1895] 2 Ch. 719) affirmed.

APPEAL by J. H. Jones, a solicitor, against a decision of Stirling J. (2), upon a summons for the delivery and taxation of a bill of costs.

In October, 1893, the applicant was brought before the borough magistrate at Cardiff upon a charge of receiving stolen goods. He retained Jones as his solicitor to defend him. On October 11, 1893, he was committed for trial at quarter sessions. On October 19 he paid the solicitor 25*l.* on account

(1) This report has been completed from the late Mr. Ware's notes by Mr. H. B. Hemming of Lincoln's Inn.

(2) [1895] 2 Ch. 719.

of costs. On October 21 he signed the following document: "I agree your costs in the matter of my defence, you to pay counsels' fees, witnesses' fees, and all other disbursements, at 75*l*." This document was handed to the solicitor, but was not signed by him. On the same day the applicant was tried and acquitted. On October 10, 1894, he paid the balance of the 75*l*. to Jones. In 1895 the summons was taken out.

Upon the summons being opened the preliminary objection was taken that the High Court had no jurisdiction in the matter. Stirling J. overruled the objection. On a subsequent day Stirling J. set aside the agreement and ordered taxation of the costs.

The solicitor appealed.

Dunham, for the appellant. It is submitted that the preliminary objection, which Stirling J. overruled, namely, that the High Court had no jurisdiction, but that, by virtue of the Attorneys and Solicitors Act, 1870 (1), the application to set

(1) Sect. 4: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a Court or a judge to be taken thereon by motion or petition, and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

Sect. 8: "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such

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aside the agreement should have been made to the Court in which the business was done, that is, to the magistrate or to the quarter sessions, is a good objection. When there is an agreement within the Act, s. 15 positively prohibits taxation of the costs otherwise than under the provisions of the Act. If the justices are, as I contend, the proper Court, then the Act gives them power to set aside the agreement.

If the words "Court or a judge thereof" are limited to a Court which has judges who can act independently, a county court would be excluded, and yet s. 4 speaks of work done by a solicitor "as an advocate." That must include a county court, for in such a court a solicitor can act as an advocate. Under the old law the Common Law Courts had jurisdiction to tax costs in relation to business at quarter sessions: *Sylvester* v. *Webster*. (1) And under s. 37 of the Solicitors Act of 1843 (6 & 7 Vict. c. 73), it was held that the Queen's Bench Division was the proper Court to tax costs in proceedings before magis-

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agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements in respect of which the agreement is made, by the Court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any court, then where the amount payable under the agreement exceeds fifty pounds, by any superior Court of law or equity or a judge thereof, and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement."

Sect. 10: "When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person chargeable with or entitled to pay the same, any Court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such Court or judge that the special circumstances of the case require the agreement to be re-opened, re-open the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the Court or judge may seem just."

Sect. 15: "Except as in this part of this Act provided, the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act shall not be subject to any taxation, nor to the provisions of the Act of the 6 & 7 Vict. c. 73, and the Acts amending the same respecting the signing and delivery of the bill of an attorney or solicitor."

(1) 9 Bing. 388.

trates: *In re Lewis.* (1) The reason for so holding must have been that proceedings before a magistrate came within the words "business transacted in any other court" in s. 37. Consequently, for the purposes of that Act, quarter sessions and a magistrate are a "Court." If the word "Court" in the Act of 1870 does not include quarter sessions, the same word in two Acts dealing with similar subject-matters will have different meanings.

[LINDLEY L.J. The subject-matter of the Act of 1870 is agreements between solicitors and their clients as to the solicitor's remuneration—not the jurisdiction of the Courts.]

Before the Act of 1870 the Court had no jurisdiction to set aside such agreements, which were then absolutely void.

There can be no taxation of costs until the agreement has been set aside.

[LINDLEY L.J. We wish to hear you on the merits of the case.]

After hearing the appellant's counsel on the merits,

LINDLEY L.J. said:—We are satisfied that good ground for taxation has been shewn if the High Court has jurisdiction to set aside the agreement.

Dec. 5. *Ashton Cross*, for the client, was not called upon.

LINDLEY L.J. Before the Attorneys and Solicitors Act of 1870 no one ever dreamt that either a magistrate or justices at quarter sessions had jurisdiction to set aside an agreement; and it would be strange if the Legislature in legalising agreements between solicitors and their clients as to costs, and providing machinery for setting aside such agreements, had made such a large alteration in the law without shewing any sign of an intention to do so. It must, however, be admitted that there are some words in the Act which favour Mr. Dunham's contention. The Act contains no definition of the word "Court." It is called "an Act to amend the law relating to the remuneration of Attorneys and Solicitors," not an Act to extend the powers of magistrates or quarter sessions. Sect. 4 in effect

(1) 1 Q. B. D. 724.

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enables a solicitor to make an agreement with his client for the payment of a lump sum as his remuneration for work done, thus avoiding the necessity of taxation. [His Lordship read the first part of the section, and continued:—] It renders lawful that which was previously unlawful. There can be no question that the words of this part of the section apply to business done in all courts, including a criminal court, or no court at all. Then follows a proviso, and in it for the first time in the Act the expression "Court or a judge" is used, and it must mean a Court or a judge qualified to try an action at law or hear a suit in equity. [His Lordship read s. 8, and continued:—] Mr. Dunham says that the work done by the solicitor in the present case was done in a court, and that the court which alone has jurisdiction to set aside the agreement is the court in which the work was done. But the expression used in s. 8—"the Court or a judge thereof"—appears to me inapplicable to a police magistrate or to a court of quarter sessions. A police magistrate is not usually spoken of as a "judge," nor are justices sitting at quarter sessions usually called "judges." The expression "Court or a judge thereof" obviously refers to a court of law or equity which in the exercise of its ordinary jurisdiction has power to set aside agreements of this kind. The other sections do not carry the matter any further. No doubt the language on which Mr. Dunham has relied is to some extent in favour of his contention. But when I ask myself, Is this language so plain as to give magistrates or justices sitting at quarter sessions an entirely new jurisdiction? I can only answer it is not. It must also be remembered that under the Act of 1843 these costs would have been taxed in the Queen's Bench Division, and it seems to me absurd to suppose that the Legislature intended to transfer the jurisdiction from the Court of Queen's Bench to the court of quarter sessions. The appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. [After stating the facts, and reading s. 8, his Lordship continued:—] I agree that s. 8 is not artificially drawn; but, looking at it as a whole, it is, I think, clear what the Legislature intended. Sect. 4

enables a solicitor to enter into a bargain with his client for a lump sum. That is the first section of the Act in which the term "Court or a judge" is used. That section does not refer to a magistrate or to a court of quarter sessions. Then s. 8 enacts: "No action or suit shall be brought or instituted upon any such agreement." Did any one ever hear of bringing an action or instituting a suit before justices, either at petty sessions or at quarter sessions? The words "action," "suit," "motion," "petition" are all applicable to a proceeding in a superior court, or possibly in a county court. Then what is the meaning of the words "the Court or a judge thereof"? A magistrate is not described as a "judge" of a court, but as a justice of the peace. Magistrates are justices in petty sessions and in quarter sessions assembled, which is composed of justices. The language of the section is wholly inapplicable to them. The section provides a remedy in the case of "business not done in any court," i.e., any court having jurisdiction to enforce or set aside the agreement. It is suggested that in the present case the effect of this section is to transfer the jurisdiction to set aside an agreement from the Courts which had previously exercised it to a magistrate, or to the justices at quarter sessions assembled. I cannot read the section that way. Sects. 10 and 15 neither add to nor detract from s. 8. The technical objection, therefore, fails, and, there being ample evidence of undue pressure, I think that the agreement ought to be set aside and the judgment of Stirling J. affirmed.

RIGBY L.J. I am of the same opinion. I agree with the construction which has been put on the words "the Court or a judge thereof." So far as I know, it is neither the legal nor the common practice to speak of magistrates or justices as "judges." No doubt they have important judicial functions to perform, but they have been called "justices" for centuries; and primâ facie when the Legislature uses the words "a Court or a judge thereof" it is intended to exclude those courts. Then we find that the functions imposed by this statute are such as never have been imposed upon justices. I cannot, therefore, feel any doubt that the expression "business not done

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in any court" means business not done in any court which has jurisdiction to set aside agreements. Assuming the technical difficulties to be out of the way, I think that this is a proper case for setting aside the agreement, and ordering taxation of the costs. The appeal must be dismissed.

Solicitors: *Riddell, Vaizey & Smith, for J. H. Jones, Cardiff; Vallance & Vallance, for H. E. Murly, Bristol.*

W. L. C.

C. A. 1895 *Dec.* 5.

In re LORD AND FULLERTON'S CONTRACT.

[1895 L. 8454.]

Vendor and Purchaser—Trustee—Partial Disclaimer.

A testator having real and personal property in England and abroad left his residuary estate to trustees upon trust for sale. One of the trustees disclaimed the trusts of the will except as to the property abroad. The remaining trustees sold land of the testator in England:—

Held, that the disclaimer had no effect, and that the disclaiming trustee was a necessary party to the conveyance.

APPEAL from a decision of the Deputy Chancellor of the County Palatine of Lancaster upon a summons taken out under the Vendor and Purchaser Act, 1874. Samuel Lord by his will, dated September 26, 1888, appointed his daughter Mary T. Lord, his son John T. Lord, his friend John S. Lyle of New York, in the United States of America, his son Samuel Lord the younger, and his brother-in-law J. T. Bradbury, executors and general trustees of his will. And he devised his real estate and bequeathed all his personal estate not thereby otherwise disposed of unto the said Mary T. Lord, John T. Lord, J. S. Lyle, Samuel Lord the younger, and J. T. Bradbury, upon trust to sell and convert the same into money, and to hold the proceeds upon the trusts therein mentioned.

The testator died on May 23, 1889; and on July 15, 1889, his will was proved by Mary T. Lord, John T. Lord, and J. T. Bradbury, power being reserved to J. S. Lyle and Samuel Lord the younger to come in and prove the same.

On September 19, 1889, J. S. Lyle by deed-poll disclaimed the offices of trustee and executor under the will.

On February 15, 1890, Samuel Lord the younger, who was resident in and was a naturalized subject of the United States of America, executed a deed-poll of that date, whereby, after reciting the will of the testator, he disclaimed the offices of trustee and executor in the following terms: "The said Samuel Lord, party hereto, doth hereby declare that he has from the time of the decease of the said Samuel Lord, the testator, refused to act as a trustee or executor of the said will so far as the same relates to property real and personal without the bounds of the United States of America, and he disclaims and renounces the said offices of trustee and executor, and all interest in and power over the real and personal estate without the bounds of the United States of America devised and bequeathed by the said will."

On March 21, 1895, the three remaining trustees, who resided in England, entered into a contract with H. Fullerton for the sale to him of certain real estate of the testator in England for 3575*l.*, on which he paid a deposit of 150*l.* On June 20 the purchaser sent in an objection that Samuel Lord, the son, ought to be made a party to the conveyance, as his disclaimer, being only partial, was not sufficient in law. After some correspondence, the purchaser took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the vendors had not made out a good title to the property by reason that Samuel Lord had not made an effectual disclaimer of the trusts of the will.

The Deputy Chancellor held, upon the construction of the deed of February 15, 1890, that it amounted to a general disclaimer; and he therefore made a declaration that a good title had been shewn to the property.

The purchaser appealed.

Farwell, Q.C., and *G. H. Norris*, for the purchaser. A trustee of English and foreign property cannot disclaim the trusts of the English property while retaining control over the foreign property. There is no case exactly in point, but it has

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been held in the case of an executor trustee that probate of the will is an acceptance of the whole trusts of the will, and that it is not open to him to renounce the one office without also renouncing the other: *Ward* v. *Butler* (1); *Mucklow* v. *Fuller* (2); *In re Gordon* (3); and see *Guthrie* v. *Walrond*. (4) Lord's deed of disclaimer amounts to an admission that he has intermeddled, or intends to intermeddle, with the trusts in America; he is therefore a trustee for all purposes, and the purchaser is entitled to object that he is not a party to the conveyance, inasmuch as it is a breach of trust for the three remaining trustees to deal with the property in question without his concurrence, and a breach of trust of which the purchaser would, under the circumstances of the case, be held to have constructive notice: *Urch* v. *Walker* (5); and see *Cummins* v. *Cummins*. (6) Upon the question of construction the learned judge was clearly wrong in holding this disclaimer to be an absolute disclaimer of the offices of trustee and executor.

Warmington, Q.C., and *W. H. Cochran*, for the vendors. Taking into consideration the deed of disclaimer and the omission to prove, there is amply sufficient to shew that Lord has never undertaken the duties of a trustee or accepted the trust at all. This case is distinguishable from the cases cited on behalf of the appellant by the fact that the excepted property is property outside the jurisdiction of the Court. The disclaimer may, therefore, be treated as absolute for the present purpose, seeing that the trustee has disclaimed everything over which this Court has jurisdiction.

Farwell, Q.C., in reply.

LINDLEY L.J. The point raised by this appeal is a short one, but it is important. [His Lordship stated the facts, and continued:—]

The purchaser's position is this. He says, "The testator has devised real estate to five persons. The property has been put up for sale by three of them. I require either that the

(1) 2 Mol. 533.
(2) Jac. 198.
(3) 6 Ch. D. 531.
(4) 22 Ch. D. 573.
(5) 3 My. & Cr. 702.
(6) 3 J. & Lat. 64, 93.

five shall concur, or that the three who are acting in this country shall produce, instead of the concurrence of the other two, such deeds of disclaimer as shew that the three alone can properly deal with the property according to the trusts of the will." As to one of the absentees the purchaser is satisfied; but as to the other, Mr. Lord, the son, he is not satisfied, because he says the disclaimer of February 15, 1890, is inoperative; and in the first place he contends that upon the true construction of this document it cannot be regarded as a disclaimer of the offices of trustee and executor generally, but must be read as a disclaimer of those offices limited to such property as is without the bounds of the United States. [His Lordship dealt with the question of construction of the document, and held that it did not constitute a general disclaimer, and he continued as follows:—]

Treating this, therefore, as a partial disclaimer—as a disclaimer of the offices of trustee and executor so far as the property in this country is concerned—the point is reduced to this: Will that enable the three trustees who are the vendors to make a good title? Now, although the point, so far as I know, is new in species, I think the purchaser is right—that is to say, that according to our law it is not competent for a trustee to execute or to rely on a partial disclaimer of the office either of executor or of trustee, or of the property devised to him. Let us consider what his position is in this case. It is to be observed that he is executor as well as trustee. What would be the position under this document if he remitted personal estate from America to this country? Would not he be responsible for it? Would this disclaimer by him affect him in any way? I should say, obviously not. He would be clearly responsible for the property in respect of his office if he accepts the office at all—in other words, from a purchaser's point of view, if he is not proved not to have accepted he must be deemed to have accepted the office of the trust; and then the ordinary principle applies, that it is not competent for a man to do that partially: he must either do it altogether or not at all. The cases which have been referred to on behalf of the appellant bear that out; and so far as property within the jurisdiction is concerned, I think the point would

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hardly be arguable. But it is said, if a trustee disclaims his trusteeship of all the property in this country that disclaimer will be operative although he may still retain the administration of other property out of the country, and be responsible here for the rents of that property if he comes here. I do not think that can be so when the trusts of the real estate are so mixed up with the trusts of the personal estate as they are in this particular case. I do not see how it is possible to give effect to that argument when it seems to me it would be absolutely clear, according to our law, that this disclaimer would not shield Mr. Lord from an action in this country to make him liable as executor. But even if there was no mixing up of the personal estate and the real estate, and even if the trustee were a trustee of land only, I do not think that he could get rid of his duty as regards any property vested in him as trustee, if he remained a trustee at all. A testator intends when he makes such a will as this that his cestuis que trust shall have the joint judgment of all the trustees upon all the property subject to the trusts of the will whether in this country or abroad; and I do not think that it is competent for any trustee to say, "I will attend to some of the trusts, and I will not attend to others." It is competent for him to say that he will have nothing to do with the trusts; otherwise a testator would be able to saddle people with duties of an onerous description without their having any opportunity to get rid of them. But it is not competent for him to accept the office as to some part of the estate and not accept it as to the rest. That principle applies here. It is said that that is hard and inconvenient, and leads to complication; and so it does; but the answer to that is that a testator who has property in the colonies or abroad and property here will, if he is a wise man, have two sets of trustees, and devise his colonial or foreign property to persons in the country where the property is situated, and devise his English property to persons in this country. But if he says, as this testator has said, "I intend to have five trustees, and I intend that they shall protect my cestuis que trust," I do not think it is competent for one of those trustees to say, "I will accept the office as to foreign property, and I will not have anything to do with it as

regards English property"; nor would it be competent for a person in England to say, "I will accept the office as regards property here, and not have anything to do with it as regards foreign property." It appears to me, therefore, that the appeal must be allowed, that the purchaser's objection is a good one, and that the proper order to make is an order in the form of the order in *In re Hargreaves and Thompson's Contract.* (1)

A. L. Smith L.J. I am of the same opinion. [After stating the facts, and referring to the deed of February 15, 1890, his Lordship continued:—]

Mr. Lord's disclaimer shews that it was his intention, even if he had not done so already, to intermeddle as trustee in the testator's affairs in America, though it was not his intention to intermeddle in the English affairs. Can a trustee do that? The authorities which have been cited are all on one side. A trustee cannot accept a portion of the trust and disclaim the other portion. He must disclaim in toto, or he remains a trustee as to all. Upon the true construction of this disclaimer, Mr. Lord did not disclaim the whole of the trust, which was left to him in conjunction with the four other trustees. Therefore the purchaser is right in saying, "You have not shewn me a good title, because you have not shewn me that Mr. Samuel Lord the younger is out of the trust; and he ought, therefore, to be a party to the conveyance." It is said that this is a most important point to the public, and especially to gentlemen living in Lancashire, many of whom have estates in Lancashire and also estates in America. I would point out that I do not think there is much in that observation, for the simple reason that a testator in the happy position of having estates both in Lancashire and America could, if he were so minded, obviate the difficulty which has arisen in this case by creating two sets of trustees—English trustees and American trustees. The appeal must be allowed.

Rigby L.J. I entirely agree with the reasons already given, and I will say nothing about those parts of the case which appear to be settled by authority—the authority being that you

(1) 32 Ch. D. 454.

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cannot disclaim in part; but it is said that there is a special circumstance here which comes within no decisions that have yet been arrived at by the Court, and that is that there is a disclaimer of everything within the jurisdiction of this Court—in fact, of everything that is outside the bounds of the United States of America; and it is said that that makes a broad distinction. I cannot see it. It is, no doubt, perfectly true that we have no jurisdiction over land in America in this sense, that we cannot make orders which of their own force will affect that land; but we have jurisdiction over the trustees in this country, and by service out of the jurisdiction we should be able to act upon a trustee out of the jurisdiction, if the case were otherwise proper, in respect of that land. Similarly, the Court of Probate cannot of its own authority enable the executors who get probate here to get in the assets in America. That is perfectly true; but the jurisdiction over the person of the executors remains, and the trustees and executors in this double capacity are responsible here equally in relation to the real estate and to the personal estate in America as in relation to the real estate and personal estate within our own jurisdiction.

The argument of inconvenience really comes to nothing. I have known many cases where that has been easily met—cases, for instance, where a testator is domiciled in France and has property in England. He may easily, if he chooses, have one will with regard to the French property, and one will with regard to the English property, or, even without having two wills, he may have one set of trustees as regards one property, and a separate set of trustees as regards the other. Then the difficulty which is supposed to exist is at once got over. I am not sure that it would not always be better to adopt that course; in some cases, certainly, it would be. I see no hardship, and I think that no valid distinction can be based on the ground that the part disclaimed extends to everything within the jurisdiction of the Court.

Solicitors: *Ford & Ford, for Richard Higham, Manchester*; *Field, Roscoe & Co., for Yates, Johnson & Leach, Liverpool.*

M. W. (1)

(1) See note (1), p. 222 above.

In re EARL OF STRAFFORD AND MAPLES.

C. A.
1895
KEKEWICH J.
Nov. 1.
C. A.
Dec. 16, 17.

[1895 S. 2372.]

Settled Land—Tenant for Life—Rent-charge—Improvement—"Incumbrance"—Sale of part of Land—Exoneration—Contribution—Board of Agriculture, Sanction by—Tithe Act, 1842 (5 & 6 *Vict. c.* 54), *s.* 16—*Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *ss.* 15, 63, 68, 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 5, 30—*Purchase-money—Interest—Conditions of Sale—"Wilful default."*

"Incumbrance" in s. 5 of the Settled Land Act, 1882, includes a rent-charge created under the Improvement of Land Act, 1864; and therefore where settled land is subject to such a rent-charge, the tenant for life can, on a sale of part of the land, effectually exonerate the part sold by obtaining the consent of the owner of the rent-charge to charging the whole of it upon the unsold land under s. 5 of the Act of 1882, and the intervention of the Board of Agriculture under ss. 68 and 69 of the Act of 1864 is unnecessary. Decision of Kekewich J. reversed.

As the exoneration operates as an effectual discharge of the land sold, the purchaser is not liable, under s. 63 of the Act of 1864 and s. 16 of the Tithe Act, 1842 (5 & 6 Vict. c. 54), to contribution at the instance of owners of unsold land subject to the rent-charge.

Per Kekewich J.: Where a purchase cannot be completed by the appointed day through the failure of the vendor to obtain the concurrence of necessary parties, he cannot claim interest from the purchaser under the usual condition requiring the purchaser to pay interest on the purchase-money "if from any cause whatever, other than the wilful default of the vendor," the purchase is not completed by the appointed day, the delay being attributable to the vendor's "wilful default."

In re Hetling and Merton's Contract ([1893] 3 Ch. 269) followed.

On February 11, 1886, an order was made by the Land Commissioners under the Improvement of Land Act, 1864, charging the Wrotham Park estate, of which the then Earl of Strafford was tenant for life, with the payment of a yearly rent-charge of 1265*l.* 11*s.* 4*d.*, payable half-yearly, in favour of certain persons for the term of twenty-five years, each half-yearly payment representing the repayment of an instalment of principal and interest as provided by the Act.

On June 4, 1895, the present Earl, who had succeeded his father the late Earl as tenant for life of the Wrotham Park estate, entered into a contract for the sale of a small portion of

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the estate to certain purchasers; and shortly after the delivery of the abstract the vendor submitted to the purchasers the draft of a deed of exoneration which the vendor proposed should be executed by himself and the owners of the rent-charge by way of release of the property sold from the rent-charge, and throwing the entire rent-charge upon the property remaining unsold. The purchasers, however, made a requisition objecting that the deed required the approval of the Land Commissioners (now the Board of Agriculture) under s. 68 of the Improvement of Land Act, 1864.

The vendor's solicitors, on the other hand, contended that an application to the Board of Agriculture was unnecessary, and that the vendor and the incumbrancers could together make a good title to the purchasers under s. 5 of the Settled Land Act, 1882, and effectually release the land sold from the rent-charge; and they accordingly declined to submit the draft to the Board for approval.

As the purchasers insisted on their requisition, the vendor took out this summons under the Vendor and Purchaser Act, 1874, for an order and declaration that the purchasers' requisition had been sufficiently answered, and that on the execution by the vendor and the owners of the rent-charge of the exoneration deed the property sold would be released from the improvement rent-charge without any consent on the part of the Board of Agriculture, and that upon the execution of the deed the vendor would have shewn a good title.

The summons was heard before Kekewich J. on November 1, 1895.

Bramwell Davis, Q.C., and *F. E. Farrer*, for the vendor. This exoneration deed has been prepared in accordance with s. 5 of the Settled Land Act, 1882, which says that, where on a sale there is an incumbrance affecting land sold, "the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold," and by conveyance, or otherwise, make provision accordingly. The effect of a conveyance and release under that

section, as under s. 10 of Lord St. Leonards' Act of 1859, 22 & 23 Vict. c. 35, is to absolutely release the land conveyed from the rent-charge: *Booth* v. *Smith*. (1) It is said, however, that the land sold cannot be effectually released without the sanction of the Land Commissioners (now the Board of Agriculture) under s. 68 of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114); Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2. (2) But s. 68 only says that the commissioners "may"—not "shall"—on notice to the owner of the rent-charge, release any part of the land charged: so that the Act leaves open to the landowner the ordinary modes of release known to the law. The vendor can therefore, as tenant for life, make a good title free from the rent-charge with the consent of the owners of the rent-charge, under s. 5 of the Settled Land Act, 1882.

Warrington, Q.C., and *Medd*, for the purchasers. The object of the Act of 1864 is to protect the remaindermen and other

(1) 14 Q. B. D. 318.

(2) The material part of s. 68 of the Improvement of Land Act, 1864, is as follows: "If at any time land charged under this Act, or under any other Act authorizing the creation of charges by the commissioners, is occupied in separate farms or other holdings, or has become the property of separate owners, or the owner thereof is entitled thereto under separate titles or for distinct and separate interests, or is desirous to sell or dispose of part of such land, or part only of such land is subject to any mortgage or other incumbrance, or for any other reason it would be desirable that the charge should be apportioned or a part of the land charged released therefrom, the commissioners may, with the consent of the landowner, or if the land has become the property of separate owners, or a part thereof is subject to any mortgage or incumbrance, then upon the application of any one of such owners, or of such mortgagee or incumbrancer, but in every case with due notice to the grantee or assignee of the charge . . . . and to such other parties (if any) as the commissioners think right, either release from such charge any part of the land charged therewith, or apportion such charge so that a separate and distinct charge may become charged on each separate farm or holding, or on the land of each landowner, or on the land held under each separate title or for each distinct and separate interest, or on the part or each part which the landowner is desirous to sell or dispose of and the part intended to be retained by him, or on the part subject to such mortgage or other incumbrance and on the residue, or on any other separate parts of the land: . . . . Provided that no lands shall, in consequence of any such apportionment or release, become charged with any greater amount than that to which, in the opinion of the commissioners, they have been durably benefited by the improvements in respect of which such charge was created."

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persons interested in the land charged. The notion of the Legislature was that an improvement rent-charge should only be sanctioned if it could be shewn that the result of the improvements would be to increase the annual value of the land: s. 15. That is the scheme of the Act, and s. 68 must be read bearing that in mind. The intention of the Act was that no more than a sum bearing a certain proportion to the annual value of the land should be thrown on any particular part. It is obvious on reading the Act that the intention of the Legislature was that the owner of a rent-charge created under the Act should not be at liberty, even with the consent of the landowner, to deal with the rent-charge as he pleased. The effect of s. 68 is that it is left to the commissioners alone to determine whether a release of any part of the land charged shall be sanctioned. That view is borne out by the elaborate provisions for a formal order and registration under s. 69, shewing exactly what land is released from the rent-charge and what land is to remain charged. It is clear, therefore, upon the Act itself, that the incumbrancer alone cannot release any part of the land from the rent-charge, and that such release can only be effectually made by the commissioners. It is said, however, that this legislation has been altered by the Settled Land Act, 1882. That Act, by s. 5, does no more than give a tenant for life the power, on a sale, of shifting an incumbrance from one part of the land to another; but that he can only do "with the consent of the incumbrancer," that is, a person who is able to deal with the incumbrance. The section necessarily presupposes that the consent can be effectually given; but by s. 68 of the Act of 1864 the consent of the incumbrancer is not of itself sufficient to release land from a rent-charge created under that Act. In fact, s. 5 of the Act of 1882 is not dealing with a statutory incumbrance or rent-charge such as that under the Act of 1864. The rent-charge is created under a statutory power, and can only be released in the manner required by statute. The Act of 1864 cannot be said to be repealed by the Act of 1882, either expressly or by implication. Sect. 30 of the Act of 1882 is the only section referring to the Act of 1864, and, so far from repealing it, it is an extension of the prior Act.

[KEKEWICH J. You may put your argument higher than that, for the Act of 1882, in the schedule, does expressly repeal parts of the Act of 1864.]

Yes; it does repeal certain sections, but not the sections which affect the present case. That confirms our argument. We therefore submit that the purchasers' requisition is right, and that the execution of an exoneration deed is not sufficient without recourse being had to the provisions of the Act of 1864.

Bramwell Davis, Q.C., in reply. I rely on the precise language of s. 5 of the Settled Land Act, 1882—that a tenant for life may exonerate land sold "with the consent of the incumbrancer." "Incumbrancer" has a well-recognised meaning: it means the person who has actually a charge on the land; and it is immaterial whether the charge is under statute or not. The commissioners, or Board of Agriculture, have no charge on the land. The persons who have the charge are those named in the order mentioned in s. 69 of the Act of 1864. If, therefore, the consent of the actual incumbrancers is obtained, that is quite sufficient. Sect. 68 is merely an enabling section: that is to say, the commissioners are not bound to proceed in the mode there indicated; but if they do, then the release is to be carried out in a certain way. The section does not interfere with the ordinary law as to the release of the incumbrance. The case of *In re Howard's Settled Estates* (1) shews that a charge may be shifted from one portion of settled land to another under the provisions of the Settled Land Act, 1882; and what is now proposed to be done seems to be in accordance with the recognised practice of conveyancers: Key and Elphinstone's Conveyancing, 4th ed. vol. 2, p. 688.

KEKEWICH J. held that an incumbrancer under the Act of 1864 was not an incumbrancer who could consent within the meaning of s. 5 of the Act of 1882; and that such a deed as had been proposed would not be effectual to release the land sold or to charge the remainder of the estate. There was no power under s. 5 to throw upon the unsold land the rent-charge which originally, with the sanction of the commissioners after judicial

(1) [1892] 2 Ch. 233.

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investigation, had been thrown on the unsold land together with the land sold. The charge had been thrown on the entirety of the estate, and, except under the provisions of the statute of 1864, could not be taken off the entirety and thrown on part. There must accordingly be an order as follows: "The Court being of opinion that the execution of such a deed as is proposed will not effectually release the land sold, Declare that the purchasers' requisition has not been sufficiently answered, and order the vendor to pay the costs of this application."

The contract contained the usual condition that "if from any cause whatever, other than the wilful default of the vendor," the completion of the purchase was delayed beyond the appointed day (which had long passed), the balance of the purchase-money should bear interest at 4 per cent. Accordingly,

Warrington, Q.C., for the purchasers, asked to be relieved from payment of interest on the balance of purchase-money, on the ground that the delay in completion had been caused by the "wilful default" of the vendor within the meaning of the condition: *In re Hetling and Merton's Contract.* (1)

Bramwell Davis, Q.C., for the vendor, said that, having regard to the authorities, he would not argue the question.

KEKEWICH J. The delay has arisen from the "wilful default" of the vendor within my decision in *In re Hetling and Merton's Contract* (1) affirmed by the Court of Appeal. Therefore the purchasers are not liable to interest.

The vendor appealed from so much of the order as declared that the purchasers' requisition had not been sufficiently answered. The appeal was heard on December 16 and 17, 1895.

Bramwell Davis, Q.C., R. M. Pattisson, and *F. E. Farrer,* for the appellant, the vendor, and

Warrington, Q.C., and *Medd,* for the respondents, the purchasers, repeated the arguments urged in the Court below, counsel for the purchasers further contending, as an objection

(1) [1893] 3 Ch. 269.

to the proposal of the vendor to make a title by a release from the owners of the rent-charge, that the purchasers would still remain liable, at the instance of the owners of portions of the unsold land subject to the rent-charge, to proceedings for contribution under s. 16 of the Tithe Act, 1842 (5 & 6 Vict. c. 54), which was incorporated in the Improvement of Land Act, 1864, by s. 63 of the latter Act.

Bramwell Davis, Q.C., in reply.

Lindley L.J. stated the facts, and proceeded :—First of all, I will refer to the Settled Land Act, 1882. Sect. 5, on which this case really turns, says that, where on a sale there is an incumbrance affecting land sold, "the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold, ... and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

Now, the power given by that section is an additional power given to the tenant for life who has power under s. 3 to "sell the settled land." We all know that one of the great objects of the Settled Land Act, 1882, was to facilitate sales of land. It gave tenants for life enormous powers, and amongst others the power to sell land of which they were only tenants for life, notwithstanding the subsequent limitations of the settlement. Then it was felt that there might be a difficulty about incumbrances, and a power was accordingly given to the tenant for life by s. 5 in the terms I have read. Nothing can be larger than the language of that section; and I think it lies on any one who says that that section does not mean what the words apparently do mean, to shew to what extent, if any, those words ought to be restricted. In the present case the purchaser says that a rent-charge created under the provisions of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), is not an "incumbrance" within s. 5 of the Settled Land Act. Why is it not? The reason alleged is that, under the Improvement of Land Act, 1864, these charges are made charges by the

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statutory commissioners, whose duty it is to consider the interest of everybody whose property is charged and who have power to consider all the circumstances; and accordingly s. 68 provides that whenever a rent-charge has to be apportioned it can only be apportioned by the commissioners subject to the conditions therein referred to. The question really turns more upon s. 68 than any other, and I will refer to that without going through or referring to the various sections that have been read, and which I do not think it necessary to deal with. [His Lordship then read s. 68 (1), and also s. 69, which requires that every apportionment or release shall be made by an order of the commissioners, in the forms given in Sched. D or E to the Act, and shall be registered in the manner prescribed in s. 54 (2), and proceeded:—]

Just let us consider what s. 68 does. It says nothing at all as to what the owners of the incumbrances can do themselves. The owner of the statutory rent-charge is the owner of the incumbrance, and one cannot see why he should not be at liberty to release it. There is nothing here to prevent him doing so, or to prevent him releasing part of the land charged if he chooses to do so, and to take the consequences, one of which consequences may be that by releasing part he may release the whole; and he might, I suppose, if he chose, release the whole. Under Lord St. Leonards' Act the rent-charge might be apportioned, but if he chooses to release part of the land charged there is nothing against it. The object of s. 68 is not to fetter the owners of the charge, but to confer on the commissioners a power which but for that section they would not have, and which power, be it observed, can be exercised adversely to the persons interested in the estate. The duty is entrusted to the commissioners to look after the interests of those who have interests in charges, and so on; but if the commissioners are exercising their powers then, according to the proviso, which is all important, they are to take care that no lands shall, in consequence of any apportionment or release made by them, become charged with any

(1) Ante, p. 237, foot-note (2).

(2) *Sic* in the Act, but apparently s. 56 is intended.

greater amount than that for which, in the opinion of the commissioners, they have been durably benefited. The owner of the rent-charge could not throw on the land which he chose to release the whole of the rent-charge which was charged on the land released and on the land not released. Of course he could not do that by himself: that could only be done with the consent of those who are interested in the whole of the lands charged. But the commissioners can do that, and that is a very important thing.

Now, passing from that, let us see whether there is in the Act of 1864 anything inconsistent with s. 5 of the Settled Land Act, 1882. I cannot myself see any inconsistency. I do not see what there is in the power given to the commissioners inconsistent with the subsequent legislation giving tenants for life power to sell land free from incumbrances. Why should they not do so with the consent of the incumbrancers? A tenant for life cannot do what the commissioners can do: that is another matter; but when you come to apply s. 5 of the Settled Land Act, the tenant for life may, with the consent of the incumbrancer, charge an incumbrance affecting the land sold on any other part of the settled land in exoneration of the land sold. I do not mean to say that he can give a statutory charge to take priority over all other charges. If the incumbrancer chooses to take the charge under that section, he will take it as an ordinary charge, subject to the ordinary priorities. That does not concern any one but the incumbrancer. If he chooses to consent, it can be done; but if he does not consent, it cannot be done by the tenant for life.

It is said that there is something in the Settled Land Act which is inconsistent with that, and reference is made to s. 30, which, as I read it, merely enlarges the number of improvements which can be made under the Act of 1864; that is to say, there are two methods of improving lands, one being under the Act of 1864, through the medium of the commissioners (now the Board of Agriculture). Their powers are increased by s. 30 of the Act of 1882, and that section does not refer to s. 5 at all. Nor is there any valid argument deducible from the repealing section—s. 64—of the Act of 1882. There are certain

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sections of the Act of 1864 modified by that repealing section and the schedule to which it refers, but there is nothing there to curtail the power given to the tenant for life; and it appears to me that if we were to deny to the tenant for life the power given by s. 5 to release land sold under s. 3, we should be doing that which is the last thing the Legislature contemplated, and we should be hampering the tenant for life in the exercise of the power of sale which is given to him by s. 3, and which is the cardinal power given by the Act of 1882.

Then Mr. Medd made a point which appeared to me entitled to some attention. He says that the purchaser will not be safe in completing the purchase with such a deed of release as is tendered to him here, because he may be called on to contribute to the payment of this rent-charge by the owners of the land remaining unsold; and he refers to s. 16 of the Tithe Act of 1842 (5 & 6 Vict. c. 54), which he says, and says truly, is incorporated in the Act of 1864 by s. 63. But the Tithe Act does not really assist him at all. That Act provides for contribution as between owners of several portions of land all subject to one tithe rent-charge; but that case will not arise here. The purchasers in the present case will have a perfectly good title discharged from the whole of this statutory rent-charge, for the conveyance and release will be effected with the consent of the owner of the rent-charge, and the contention on behalf of the purchasers that, notwithstanding this conveyance, the owners of the rent-charge can come down on the land sold seems to me utterly untenable.

I think, therefore, that the appeal must be allowed, and with costs.

A. L. Smith L.J. I agree.

Rigby L.J. In deference to the opinion of the learned judge of the Court below, although I should be content to rely entirely on the judgment which has been delivered by Lindley L.J., I should like to add a few observations.

The Act of 1864 was a very beneficial one, enabling limited owners to charge the lands of which they were limited owners with rent-charges for specified improvements. Of course that

power was effectually safeguarded, and the course adopted was to create a jurisdiction in the commissioners (now represented by the Board of Agriculture), who were to see that the improvements were such as would enhance the value of the land charged; and therefore all persons interested in the land, including incumbrancers, would understand exactly the value of the improvements before they sanctioned the rent-charge.

The Legislature evidently thought that a rent-charge such as I have indicated, extending, it might be, over a large property, might seriously hamper owners of land in dealing with their properties; and accordingly s. 68, as I understand it, makes the commissioners the tribunal for redressing any undue interference with the owners of land in dealing with their estates. It enables the commissioners, on the application of an owner in specified cases, one being where the owner is desirous of selling a portion of the land, to reconsider the position of things and inquire whether it is necessary that the whole of the rent-charge should remain charged as it has been by the absolute order made by the commissioners in the first instance; and if they find that, consistently with the interests of the owner of the rent-charge and the other persons concerned, they may release a portion of the land charged, they have jurisdiction to do so—a jurisdiction carefully hedged about, no doubt, but still a jurisdiction which they can exercise in invitum, notwithstanding the resistance of the owner of the rent-charge, and notwithstanding, as I read the section, the resistance of other persons interested—on the ground that no harm will be done them. The commissioners may apportion the rent-charge, or they may release a portion of the land from it and charge the whole on the remainder of the property. But, as the section contemplates, one portion of the property may be in the ownership of one person or one set of persons, and other portions may have got into different ownerships. Obviously, therefore, it is a very reasonable and necessary thing to provide that, in what the commissioners do as a tribunal of reference acting between the parties, whether they consent or not, their powers shall be limited to this extent, that they shall not throw on any one part of the property a burden greater than what corresponds

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to the benefit which is derived by that property. Sect. 69 merely directs how this is to be carried into effect. I do not think for a moment that s. 68 interferes with that liberty which the owner of a rent-charge created under the Act has in common with all other owners of property, of dealing with his own property as he thinks fit. And in argument it was found impossible to press the matter so far as to say that if you have a fee-simple owner of the land, or persons making up the fee simple on the one side, and the owner of the rent-charge on the other, they may not agree as they please. That involves the result that the owner of the rent-charge may, if he thinks fit, release his charge without going to the tribunal appointed by the Act at all. He may do that which his power of ownership alone is sufficient to enable him to effect; and if he cannot release the whole charge he may release part. I do not mean to say that he can affect the interests of parties who do not consent and whose interests may be affected. I do not mean to say that he can increase the burden imposed on any part of the land; but I take it to be clear that he can release, notwithstanding any of the provisions of the Act of 1864, any part of the lands from his rent-charge. Then, if he can do that of his own free will, it follows that he may do it when, on the occasion of a sale, he is asked to do it by the person who has power to sell the land.

Then coming to the Settled Land Act, what do we find to be the scheme of that Act, speaking generally? It is an Act of great boldness and of a wide scope; and I think the provisions of it, when carefully considered, point to this—that a tenant for life, or the persons having the powers of a tenant for life under the Act, is or are for certain most important purposes, to have a power as extensive as that which an owner in fee simple has. The tenant for life may sell the land: an owner in fee simple can do no more. It by no means follows that he is converted into an owner in fee simple by the Act; he is not, but he can sell the land; and by the Act provision is made for securing the purchase-money for the benefit of those who are beneficially entitled under the settlement. Having then made the tenant for life, for the purposes of the sale, as capable of disposing of the whole of the property as if he were the fee-simple owner of

it, the Act says in s. 5 that he may, with the consent of the incumbrancer, make an arrangement for releasing the part sold free from the incumbrance, and may, with the consent of the incumbrancer, effect that by charging the whole incumbrance on the land remaining unsold, or on other settled land in exoneration of the land sold. Why should he be treated as having a less power for that purpose than if he were the owner in fee simple? It appears to me that he should have all those powers just as he has the entire power of sale.

Then the question is whether there is anything in the Act of 1864 to prevent that primâ facie application of s. 5 of the Settled Land Act, 1882, which the words certainly seem to force upon us. It appears to me that that question is already answered by the consideration that under the Act of 1864 itself the incumbrancers may, if they choose, release any part of the property charged. By saying this I do not mean to assert that by releasing one portion of the property they can, either by themselves or in conjunction with the landowner, create an additional charge in the nature of a rent-charge under the Act of 1864, with all its advantages and priorities, upon the other portion of the property; but it appears to me that they do not lose that portion which is already charged, and that it is for them to consider in the particular case whether they have not got a sufficient security already on the portions which remain unsold, and whether, with the assistance of the tenant for life selling under the powers of the Settled Land Act, they may not have that security supplemented so far as to make it a perfectly satisfactory security. Of course, if there is any doubt on those facts the incumbrancers will take very good care not to consent. They cannot be obliged to consent: the Act never intended that they should be obliged to do so; and if they do not consent the only result will be that possibly the sale of the land will be made subject to the rent-charge, or the vendor will be driven to go to the Board of Agriculture and get them to exercise the powers given to them by s. 68. Again, if they see their way to reserving for themselves a sufficient security and so consent to release the lands if sold, I can see no reason why they should not be allowed to do so. Sect. 30 of the Settled Land Act

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somewhat extends the powers of the Act of 1864, and, in my opinion, it in no way repeals any part of that Act. The very fact that the Legislature had in mind, when passing the Act of 1882, the circumstance that there was a method of creating rent-charges upon land by limited owners by the intervention of the commissioners rather leads me to the conclusion that when in s. 5 they did not make any exception with regard to the existing Act, they did not mean to make any such exception.

Now here we have this simple question, Can the owners of this rent-charge release the land proposed to be sold from the rent-charge? I think it is plain from s. 5 of the Settled Land Act that, as regards persons beneficially entitled under the settlement, the tenant for life can give a charge on the settled land which remains unsold. Whether the section goes further, or not, is not a matter that has now to be determined. It would be difficult perhaps to decide that it does go further; but that is a question for the consideration of the incumbrancers, and for their consideration alone. When we have the fact that they are prepared to execute a deed for the purpose of exonerating the property that is being sold, I say that that deed will effectually release the lands just as much as in the ordinary case of a release agreed upon between the fee-simple owners of land charged with a rent-charge and the owners of the rent-charge.

With regard to Mr. Medd's point about contribution, to my mind that would be a very good point if the first point were established that there is no effectual release. If there is an effectual release there can be no right to contribution, because that right only exists between the owners of land subject to a common charge, in which case each owner is, in equity, entitled to contribution. The statute 5 & 6 Vict. c. 54, gave a summary remedy for a contribution in the case of those persons who had paid the whole amount of a tithe rent-charge, or a greater proportion than their lands ought properly to bear, giving in fact the same remedy against owners as the tithe-owner himself would have had. But that would not enable any of the land-owners to get contribution from a person whose lands were not

subject to the tithe rent-charge, nor need any action of that sort be apprehended here if we are correct in holding that there is a release of the lands sold under this statutory provision.

I think, therefore, that the objections on the part of the purchasers are fully met, and that, so far as this question is concerned, a good title is made; and that this appeal ought to be allowed, and with costs.

Solicitors for appellant: *Farrer & Co.*

Solicitors for respondents: *Valpy, Chaplin & Peckham.*

G. I. F. C.

CHITTY J.
1896
Jan. 21.

In re SOMES.
SMITH *v.* SOMES.

[1895 S. 2522.]

Power—Release of—Tenant for Life—Power to appoint among Children—Extinction of Power—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

The fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void. The doctrines applicable to the fraudulent exercise of a power of appointment do not apply to the release of a power not coupled with a duty.

A father, tenant for life under his marriage settlement, had, in the events which had happened, an exclusive power to appoint for the benefit of a daughter or her issue, and in default of appointment the fund went to the daughter absolutely; the father, being in want of money, released this power, and subsequently he and his daughter mortgaged their interests in the fund for 10,000*l.*, the whole of which was paid to the father, and applied by him for his own purposes:—

Held, that the release was valid.

Smith v. *Houblon* (26 Beav. 482) and *In re Radcliffe* ([1892] 1 Ch. 227) discussed and applied.

Adjourned Summons.

This was an application by the present trustees of a settlement of August 13, 1862, made on his marriage by one Samuel Francis Somes, to obtain the direction of the Court as to the distribution of the proceeds of sale of the trust estate; the question raised being whether the release of a limited power of appointment by the tenant for life, by means of which he acquired a benefit, was valid. The settlement, so far as material, and the facts, were as follows:—

By the settlement real estate was conveyed to the trustees, upon trust, during the joint lives of the said S. F. Somes and his then intended wife, for the wife for her separate use, with remainder to the use of the survivor during his or her life, with remainder, after the decease of such survivor, to the use of the trustees, their heirs and assigns, upon trust for sale and invest-

ment, and to hold the trust funds and the income thereof upon trust for the children or child or remoter issue of the marriage as the husband and wife should by deed jointly appoint, and in default of any joint appointment as the survivor should by deed or will appoint, and in default of appointment, in trust for all and every the children or child of the marriage, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares.

There were only three children of the marriage, namely, a son, Francis Herbert Somes, who attained twenty-one, and died a bachelor and intestate on October 10, 1887; a daughter, the defendant Ella Mabel Somes, who attained twenty-one on June 11, 1888, and was unmarried; and a child who died in early infancy.

The wife died in 1877 without having joined in exercising the joint power of appointment.

By a deed-poll of November 11, 1887, S. F. Somes, in exercise of the aforesaid power, irrevocably appointed the entirety of the trust estate, upon such trusts for the benefit of such one or more exclusively of the other or others of the said Ella Mabel Somes and of her issue (born in his lifetime) at such age or time in such shares and in such manner as the said S. F. Somes should by deed from time to time appoint, and in default of such appointment, in trust for the said Ella Mabel Somes, her heirs, executors, administrators, and assigns.

By a deed-poll of September 30, 1893, S. F. Somes released the trust fund from the powers of appointment given to him by the settlement and the deed-poll of November 11, 1887, to the intent that the trust fund might thenceforth be absolutely discharged from the said power of appointment, and that the trust fund might devolve upon, and become vested in, the said Ella Mabel Somes as in default of appointment.

It was admitted that this release was executed in order to enable the daughter to join with her father in raising money for his immediate necessities.

On December 16, 1893, S. F. Somes and his daughter mortgaged their interests in the trust fund for 10,000*l.*, the whole of

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which was paid to S. F. Somes, and applied by him for his own purposes.

S. F. Somes was subsequently adjudicated bankrupt.

The real estate comprised in the settlement had been sold for 16,500*l.* by the trustees, at the request of the daughter and with the concurrence of the mortgagee, and of the father's trustee in bankruptcy; and the trustees, having been requested to pay 10,000*l.* to the mortgagee and the remaining 6500*l.* to the daughter, now applied to the Court by originating summons, to which the daughter and the trustee in bankruptcy were made defendants, to know whether they might properly distribute the proceeds of sale as the defendants and the mortgagee might direct.

Farwell, Q.C., and *Dauney*, for the trustees. An exercise of this power by the father in favour of his daughter, in order that she might join her father in raising money on their interests in the fund, would clearly have been bad, as a fraud on the power: this release may be valid, but it is only a device to obtain in another way what could not be obtained by a direct appointment—a device to which the Court will not give effect: *In re Little.* (1) A power coupled with a duty or trust cannot be extinguished; this power was a fiduciary one, and the Court is not bound to give effect to a release which enables the father, a tenant for life, to get a large part of the trust fund for himself.

[*Palmer* v. *Locke* (2), *Coffin* v. *Cooper* (3), and Farwell on Powers, 2nd ed. pp. 11 and 15, were referred to.]

Trustees with a bare power or a power coupled with a duty cannot release it: *Re Eyre* (4); *Saul* v. *Pattinson.* (5) The principle of these cases applies here. If the Court holds this release valid it will be going a step further than what was decided in *In re Radcliffe.* (6) The father in that case was already entitled to a moiety of the fund as his son's administrator, and the release was only necessary to obtain a transfer

(1) 40 Ch. D. 418.
(2) 15 Ch. D. 294.
(3) 2 Dr. & Sm. 365.
(4) 49 L. T. (N.S.) 259.
(5) 34 W. R. 561.
(6) [1892] 1 Ch. 227.

of this moiety; and even then the Court required him to surrender his life interest before he could have this moiety transferred. *In re Dunne's Trusts* (1) is in our favour.

C. E. E. Jenkins, for the trustee in bankruptcy, made no claim on these proceeds of sale, on the ground that S. F. Somes had already received under the mortgage more than the value of his life interest.

Byrne, Q.C., and *R. F. Norton*, for the defendant Ella Mabel Somes. The daughter wishes the mortgage to be paid off, and the rest of the sale moneys paid to her. The release of the power was valid. The doctrines as to a fraudulent execution of a power do not apply to a release; it may be doubted whether there can be such a thing as a fraudulent release; *Smith* v. *Houblon* (2) and *In re Radcliffe* (3) are absolutely in point and in our favour. This was not a fiduciary power; there was no duty imposed on the father to exercise it.

[They referred to Farwell on Powers, 2nd ed. p. 438, and were stopped.]

CHITTY J. The answer to the question put to the Court by the trustees depends upon this: Is the release of the power of appointment which the tenant for life, the father, has executed, under the circumstances of this case, a valid release of his power of appointment? [His Lordship, having shortly stated the settlement, the facts as to the family of the tenant for life, and the appointment of November 11, 1887, continued:—]

Whether this created a new power of appointment or was a remnant of the old power is immaterial; but by virtue of the appointment made in November, 1887, the trust property then belonged to the daughter or her issue, subject to her father's life interest. In September, 1893, the father released this power of appointment; and in December following the father and daughter joined in mortgaging the trust estate for 10,000*l.*, this sum being wholly paid to the father, nothing being paid to the daughter, who was living with him. The trustees have sold the trust estate for 16,500*l.*, and the question is, whether under

(1) 1 L. R. Ir. 516. (2) 26 Beav. 482.
(3) [1892] 1 Ch. 227.

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these circumstances they may now properly distribute these sale moneys in paying off the mortgage, and handing the balance to the daughter, or as she may direct. This depends on the validity of the release of September, 1893.

The trustees are now seeking the direction of the Court in this matter, their objection to the transaction being, that the father obviously obtained a benefit for himself by releasing this power; and they contend that a release by the donee of a limited power of this kind is subject to the same rules of equity as the exercise of a power.

It is settled law that a power of appointment of this kind given to a tenant for life—not a power coupled with a duty, or a power vested in trustees—is a power that can be released: that is unquestionably the law at the present day. *Smith* v. *Houblon* (1) is a direct authority upon this point. In that case a father had an exclusive power of appointment, in favour of his children, over a fund which in default of appointment was limited to them equally, and, as representative of a deceased son, he was in default of appointment beneficially entitled to one-third of the fund, and, having released this power in favour of a mortgagee, Lord Romilly held that the power had been effectually destroyed. The very same objection was taken to the release in that case as has been taken here, namely, that the father could not acquire any benefit from his own act in releasing the power; and if, therefore, the same rules of equity which are applicable to the exercise of a power are to be applied to the release of a power, the result is plain, and that case was wrongly decided. But *Smith* v. *Houblon* (1) has recently been fully considered by the Court of Appeal in *In re Radcliffe* (2), where a precisely similar point was raised, and the Court of Appeal followed *Smith* v. *Houblon* (1), and declined to follow *Cunynghame* v. *Thurlow*. (3) In *In re Radcliffe* (2) the father was entitled to his deceased son's reversionary interest in the trust fund as his administrator; and though it appears from the report that a point was raised as to the father's life interest and the son's reversion being held in different rights, yet it is

(1) 26 Beav. 482. (2) [1892] 1 Ch. 227.
(3) 1 Russ. & My. 436, n.

admitted by Mr. Byrne and Mr. Farwell, who were engaged in that case, that there were practically no debts owing by the son, and that the father was to receive a substantial benefit; and it is therefore plain upon the facts of that case that the father in executing the release of his power was augmenting the interest he already took under his son's intestacy, he being his sole next of kin. That by itself is sufficient authority to bind me, and to justify me in holding that the circumstance that the release will result in a benefit to the donee of the power is not a sufficient ground for saying that the release is a fraudulent release of the power and void.

If it be necessary to base my decision upon broader grounds, I may say that it appears to me that there is a fallacy in applying to a release of a power of this kind the doctrines applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it.

Two cases, *Re Eyre* (1) and *Saul* v. *Pattinson* (2), were cited and relied on to shew that a trust coupled with a duty, or a power in the nature of a trust, cannot be released. But these were both cases of trustees who had a power coupled with a duty—a fiduciary power in the full sense of the term; and it was held that neither before nor after the Conveyancing Act, 1881, s. 52, were trustees capable of getting rid of or releasing that part of their trust. I have nothing further to say about those two decisions except to state that in my opinion they do not apply to the present case.

(1) 49 L. T. (N.S.) 259. (2) 34 W. R. 561.

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1896
In re SOMES.
SMITH *v.* SOMES.

The result therefore is, that I answer the trustees' question in the affirmative, and say that they may properly distribute these proceeds of sale in the way they have been requested.

Solicitors: *Street, Poynder & Whatley*; *Saxton & Son*; *Trinder & Capron.*

W. C. D.

NORTH J.
1895
Dec. 10, 11.

In re COUNTESS OF ORFORD. CARTWRIGHT *v.* DUC (1) DEL BALZO.

[1895 O. 594.]

Administration—Estate Duty—Apportionment—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1 — *Settlement — Power of Appointment — Residue.*

A donee of a power over settled property appointed 35,000*l.* to one and the residue otherwise :—

Held, that the 35,000*l.* was charged on the property within the meaning of s. 14, sub-s. 1, of the Finance Act, 1894, and that estate duty was to be borne pari passu by the specific and residuary appointees.

THIS was an originating summons taken out in the matter of the estate of the late Harriet Bettina Frances, Countess of Orford, hereafter called the Countess of Orford.

The plaintiffs in the summons were the trustees and executors of her will. The defendants were beneficiaries under her will, namely, the Duke del Balzo, his wife the Duchess del Balzo, who was the daughter of the testatrix, and Viscount Exmouth.

In contemplation of the marriage of the then Earl of Orford, hereafter called the Earl of Orford, and the Countess of Orford, a settlement, dated November 9, 1841, was executed, by which the Countess assigned to the trustees of the settlement certain reversionary personal estate upon trust as the same should from time to time fall into possession, with the consent in writing of the said Earl and Countess, or the survivor; and after the decease of such survivor at their discretion to convert into money such part or parts of the same trust premises as should have fallen into possession; and from time to time with such consent or at such discretion invest the proceeds in the purchase of real estate in England or Wales. And it was agreed that such real estate should be conveyed to the uses therein mentioned. Subject to a life estate in the Earl of Orford, limitations to the first and other sons of the marriage in tail male, and certain long terms directed to be created for the purpose

(1) *Duc* is an archaic form of the modern Sp. *Duque*.

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of raising portions, it was declared that the trustees of the settlement should, in case the Countess of Orford should die in the lifetime of the Earl of Orford, stand possessed of the hereditaments directed to be purchased upon such trusts as the Countess of Orford should by will or codicil appoint.

There was no male issue of the marriage.

The Countess of Orford made her will, dated December 12, 1877, by which she devised and bequeathed and appointed all the real and personal estate of which she had power, under the settlement of November 9, 1841, to dispose of by will unto and to the use of the plaintiffs, their heirs, executors, and administrators, upon trust for sale and conversion, and upon further trust to stand possessed of the moneys to arise from such sale and conversion, and any ready money for the time being subject to the same power, upon the trusts therein mentioned. She made a codicil on the same date not relating to the property subject to her power of appointment under her marriage settlement. She made a second codicil, dated June 12, 1886, whereby, after reciting the appointment made by her will, she directed and appointed that the trustees of her will should, out of the moneys to arise from sale and conversion directed by the will and any ready money subject to her power of appointment, pay to her daughter, the Duchess del Balzo, the sum of 35,000*l.* absolutely free from all limitations and restrictions; but if the Duchess del Balzo should die in her lifetime, then that they should pay the 35,000*l.* to the Duke del Balzo, and, subject to such payment, should stand possessed of the residue of the said moneys upon the trusts which under her will would have been applicable thereto if such residue had been the whole of the same trust moneys. In the events which happened the Duchess del Balzo was entitled to a life interest in the residue of the appointed property, and Viscount Exmouth was entitled to a contingent reversion.

The Earl of Orford died on December 7, 1894. The Countess of Orford died on November 9, 1886, and her will and codicils were duly proved by the plaintiffs.

The sums raisable under the terms directed to be created amounted to 40,000*l.*

The property subject to the settlement of November, 1841, now consisted of the sum of 75,596 13*s.* 6*d.* New Consols and 24,013*l.* 16*s.* 9*d.* Metropolitan Board of Works 3½ per cent. Stock.

The trustees of the settlement of 1841 paid the estate duty on the property subject to the settlement. One of the questions raised on this summons was how the proportion of duty in respect of the property attributable to the balance, after deducting the 40,000*l.* forming the first charge under the settlement, was to be borne as between the sum of 35,000*l.* appointed to the Duchess del Balzo and the residue.

Vernon Smith, *Q.C.*, and *MacSwinney*, for the Duchess del Balzo. The estate duty imposed by the Finance Act stands on exactly the same footing as the estate duties imposed by the Customs and Inland Revenue Acts, 1881 and 1889. Under those Acts it was decided by Stirling J., in the case of *In re Bourne* (1), that the new estate duty was in the nature of probate duty, which is now abolished, rather than legacy duty, and therefore specific gifts are freed from the duty at the expense of the residue; there is no difference in principle between the residue of a testator's own estate and the residue of a fund appointed by will: *Petre* v. *Petre*. (2)

It is true that in the cases of *In re Croft* (3) and *In re Shaw* (4) it was decided that sums appointed at different dates were to bear duty imposed by the Act of 1881 equally; but it is clear that the facts in this case are more analogous to those of the case *In re Bourne* (1) than to the facts of those cases.

Swinfen Eady, *Q.C.*, and *Bryan Farrer*, for Viscount Exmouth. The point must be decided upon the words of the Act. The property in respect of which the question arises being property that does not go to the executor is within s. 6, sub-s. 4, and s. 8, sub-ss. 3, 4. The natural inference to be drawn from reading those sections is that estate duty is to be paid out of the interest of the beneficiaries pari passu. Sect. 14 deals with the apportionment of estate duty on property that does not pass to

(1) [1893] 1 Ch. 188.
(2) 14 Beav. 197.
(3) [1892] 1 Ch. 652.
(4) [1895] 1 Ch. 343.

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the executor as such. The inference from that section is that all such property is to bear estate duty pari passu whether that be so or not; inasmuch as the 35,000*l.* appointed to the Countess has priority, it is a charge on the whole property, and, by the express words of sub-s. 1 of that section, the trustees who have paid the estate duty may recover from her the pro ratâ part of the duty.

Independently, however, of the words of the Act, this duty is more in the nature of legacy duty than of probate duty, and is within the principle of *In re Croft* (1) and *In re Shaw* (2) rather than that of *In re Bourne*. (3) Even for the purpose of probate duty the balance of an appointed fund after prior appointments was not treated as being in the nature of the residue of a testator's own estate: *Wright* v. *Weston* (4); *In re Lambert's Estate*. (5)

Seward Brice, Q.C., Rowden, and *Gurdon,* for the trustees of the settlement.

Vernon Smith, Q.C., in reply.

NORTH J. In this case two questions arise—first about the estate duty, and secondly as to the costs. Under a settlement made as far back as 1841, a sum of something like 100,000*l.* was settled on trust to be laid out on the purchase of land, and, though the fund has never been laid out in that way from that time to this, the property is bound from a legal point of view, and the question arising about it must be dealt with as if it were land.

[After stating the facts, his Lordship proceeded:—]

The property to which this summons relates is said to be something like 100,000*l.* Out of that there are sums of 15,000*l.* and 25,000*l.* to come, leaving something like 60,000*l.* Then, under the codicil, it is clear that the 35,000*l.* is to be paid first, and that, the Duchess del Balzo having survived her mother, it is to be paid to her absolutely free from all limitations or restrictions. The first question, then, is whether any duty is payable in respect of the appointed property. The Earl died

(1) [1892] 1 Ch. 652.
(2) [1895] 1 Ch. 343.
(3) [1893] 1 Ch. 188.
(4) 26 Beav. 429.
(5) 39 Ch. D. 626.

after the Finance Act came into operation, and we have to look at that Act to see whether duty is payable or not.

By s. 1 it is provided that "in the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty." Among the other duties which were put an end to by that section was probate duty; so that probate duty or its equivalent is no longer payable in the cases to which this Act applies.

The next important section is the 6th.

[His Lordship read s. 6, sub-ss. 1 and 2, and proceeded:—]

Then that provision having been made as to what the executor of the deceased has to pay, sub-s. 4 enacts: "Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for this duty, or within such further time as the Commissioners may allow."

The property we are dealing with now is property which was set free by the death of the Earl, who died in 1894. But it was not under his will that it was disposed of: it was not his property at all; and therefore his executor had not to pay duty upon it, because he was only bound to pay estate duty in respect of the personal property which the deceased was competent to dispose of at his death, and this is not property which the late Earl of Orford could dispose of. The case is, therefore, one in which sub-s. 4, and not sub-s. 2, of s. 6 applies. That sub-section deals with such a case as we have now: the executor of the Earl is not accountable for the estate duty on this property appointed by the will of the Countess. If he had been, he would have been the person to render the account.

Then sub-s. 4 of s. 8 provides: "Where property passes on the death of the deceased, and his executor is not accountable

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for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested." That is to say, first the beneficiary, secondly the trustee—the person in whom property is vested in a fiduciary character—and thirdly, for there is another case, "and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property."

That is the duty "to be collected on an account" deliverable "by the person accountable for the duty." [His Lordship referred to sub-s. 8 of the same section, and read sub-s. 3, and said:—]

So that by that sub-section two things are provided. The executor of the deceased has to specify in a proper account all the property in respect of which estate duty is payable on the death of the deceased, whether it is the deceased's property or not; but his liability to pay estate duty is limited to the personal property of which the deceased was competent to dispose of at his death.

I think the only other section I need refer to is s. 14. That provides (sub-s. 1): "In the case of property which does not pass to the executor as such,"—that is the present case—"an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary." Therefore the section contemplates that in all cases coming within it, if the executor or person who has to pay the duty, the trustee or whoever he may be, has paid the duty before handing over a share or a sum of money, then he

may charge against the person to whom he is handing over the money, or recover from him, if necessary, the amount required for the duty.

Now it is said that looking at those sections it is clear from a decision of Stirling J. in *In re Bourne* (1) (a case relating to the estate duties imposed by the Customs and Inland Revenue Acts, 1881, 1889) that estate duty is analogous to probate duty, and that the incidence of estate duty must therefore be the same as that of probate duty, and that he so decided in respect to the estate of a testator who was dealing with his own estate. But the present case is quite different. It is not a case of dealing with a testator's own estate. It is a case of property passing under limitations with which the person dying has nothing to do, except that his death sets the property free—which passes under those limitations to persons who take what is at the present time in equity landed estate; with respect to which there is no probate duty existing at all, and never was. Now, that being so, I must look at the provisions of this Act itself, and say upon whom the estate duty payable in respect of real estate is to fall; and it seems to me that under the sections I have read it is intended it shall fall upon the beneficiary, and not upon any one else; and on the beneficiary or beneficiaries, as the case may be, according to their respective interests. The 2nd sub-section of s. 14 shews that inasmuch as there may be difficulties at times in ascertaining what the duty is, or a dispute about it, such question may be determined by application to the Court. Then the 1st sub-section provided, as I pointed out when I read it, that the person who has the estate may recover back any duty he has paid from a person entitled to a charge on the property: and if there is a dispute with respect to it, then it may be settled by the Court.

Under those circumstances it seems to me that those provisions of the Act are reasonably clear, and shew that in this case the Duchess, who takes 35,000*l.*, must bear the estate duty payable in respect of that amount. I should say so independently of the 14th section of the Act; but I also think the 14th section of the Act applies, because I think that sum is, to use the

(1) [1893] 1 Ch. 188.

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language of that section, a "sum charged on such property." There is a direction to sell the estate, and pay that amount out of the proceeds thereof. That seems to me clearly to amount to a charge of this money upon the estate. The legatee is entitled to have the amount raised out of the estate; but if the legatee is paid off there is an end of the matter: the legatee has no further interest, and cannot enforce any trust for sale. Therefore, if the persons entitled behind the legatee raise the money by mortgage and pay off the legatee, the legatee could not insist upon the property being sold. Even if a sale was necessary, the legatee could not insist on a sale of more than was necessary to pay off the amount to which the legatee was entitled. Therefore the legatee, as to the 35,000*l.*, has in my opinion under the 14th section a charge upon the estate. In such case "an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property." Now the persons who under the settlement are liable in the first place to account for the duty are, I suppose, the trustees of the settlement. I do not know exactly what has been done yet, but primâ facie it would appear that they are the persons to account. But if not, the persons to account for the duty in respect of this 60,000*l.* would be the executors, to whom the money would have to be paid, and to whom the money is appointed; and if they have paid it themselves, they clearly in my opinion would be entitled to charge it against the Duchess in respect of this 35,000*l.*; or, if it had been otherwise received by her, they might recover it back from her under this section.

[His Lordship also held that the costs of the application were to be borne rateably.]

Solicitors for the Duchess del Balzo and one trustee: *Caprons, Dalton, Hitchins & Brabant.*

Solicitors for Viscount Exmouth: *Burch, Whitehead & Davidsons.*

Solicitors for the other trustee: *Nicholl, Manisty & Co.*

D. P.

HUDSON *v.* CRIPPS.

NORTH J.

1895

Dec. 13.

[1895 H. 3604.]

Injunction—Implied Obligation—Common Scheme—Residential Flat.

An injunction was granted to restrain the conversion into a club of a large part of a building, adapted to occupation in residential flats, at the instance of a tenant who held under an agreement in a common form binding the tenants to rules suitable only for residential purposes.

THE plaintiff, Mrs. Hudson, was tenant of a suite of five rooms on the second floor, being Flat No. 21, Oxford Mansion, under an agreement with the defendant, who was the owner of Oxford Mansion.

The action was brought on motion on behalf of the plaintiff for an interlocutory injunction to restrain the defendant from interfering with her right to quiet enjoyment under a stipulation contained in the agreement mentioned below, and from doing anything inconsistent with the terms of the agreement.

Oxford Mansion was a building surrounded by a public thoroughfare, having a quadrangular open court in the middle, laid out for occupation in residential flats. With the exception of some offices on the ground floor looking into the street, the whole building had been occupied, till the alterations complained of in this action were commenced, as a number of residential flats. The plaintiff herself had previously been a tenant of one of the other flats under an agreement similar to that she now held under. The building was entered through one outer door. The flats on the upper floors were accessible by one staircase; the flats on each floor were approached through a verandah or gallery looking into the court in the middle of the building.

The defendant was proceeding, as the judge held, to convert the whole building, except the part let to the plaintiff, into a fashionable club-house. He was having the courtyard covered in up to the top of the first floor, converting the lower floors into billiard-rooms, smoking-rooms, and other rooms suitable

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for club purposes, and converting some rooms on the upper floors into club bedrooms.

The plaintiff had incurred expenditure in decorating and otherwise in relation to her flat, which would be lost in case she gave up her holding. The agreement under which the plaintiff held was on a printed form, between the defendant as landlord and the plaintiff as tenant. The landlord agreed to let and the tenant to take five rooms described as "Flat No. 21, Oxford Mansion," for twelve months from March 1, 1895, and thenceforth till the tenancy should be determined by either party giving a month's notice in writing. The tenant agreed "not to assign, underlet, or part with the possession of the same premises or any part thereof, nor to carry on or suffer or permit to be carried on thereon any trade or business whatsoever, nor permit any sale by auction, nor pull down or alter the construction or arrangement of any of the premises, nor cut or injure any of the floors or timbers, nor deface nor disfigure the walls or ceilings thereof, nor use the premises or any part thereof otherwise than for the purpose of dwelling-rooms; and further shall not affix or exhibit any advertisements, placards, names, notices, or other things save and except ordinary window-blinds, to, in, or upon the doors, windows, or external walls of the premises, nor commit or suffer or permit any voluntary waste or spoil, nor do any act which may be or grow to be a nuisance, disturbance, annoyance or injury to the landlord or his tenants, or any of them, or to the trustees of the late Duke of Portland or any of their tenants"; and further to permit the landlord to enter and repair; "and further to observe and conform to in all respects the annexed regulations and conditions."

The agreement contained a right of re-entry by the landlord in case of non-payment of rent or non-performance of stipulations by, or bankruptcy of, the tenant, and stipulations, among others, by the landlord not to determine the tenancy for thirty-six calendar months, and for the quiet enjoyment by the tenant of the premises.

The regulations and conditions annexed to the agreement, forming part of the same printed document provided: (1.) the

regulation of the main entrance and access from the street; (2.) the supply of keys to the tenants; (3.) the disposal of house refuse; (4.) the supply of coals; (5.) the control of water service; (6.) the use of a lift for goods only; (7.) sanitary arrangements; (8.) that animals should not be kept without the consent of the landlord; liable to be revoked in case of complaint by adjacent tenants; (9.) for putting up the names of tenants; (10.) for keeping outer doors of flats closed, and the verandahs, landings, and staircases free from obstructions; (11.) provisions in the nature of police regulations to be enforced by the hall-porter; and (12.) provisions as to the status of the housekeeper and hall-porter.

Swinfen Eady, Q.C., and *J. Bradford*, for the plaintiff. The plaintiff's tenement was let in accordance with a general scheme, under which at the time the whole building, with certain exceptions that did not practically affect the enjoyment of her rooms, were occupied as residential flats. She was strictly bound on her part to use her premises for that purpose only; and the landlord will not be allowed to do anything outside the general scheme which will interfere with the purposes for which she took her flat: *Spicer* v. *Martin* (1); *Davis* v. *Corporation of Leicester*. (2) The cases where this equity has been applied generally relate to building estate schemes. There is no distinction in principle in applying the law to the letting of residential flats: *Ryan* v. *Mutual Tontine Westminster Chambers Association*. (3)

Buckmaster, for the defendant. What the defendant is doing will not interfere with the residential occupation of the plaintiff's flat. The defendant has entered into no stipulation, express or implied, that the whole or any part of this house shall always be used as flats. There is a great distinction between the position of a person who has bought and built on part of a building estate and a single tenant for a short period who, as in this case, can determine her tenancy at once. Any injury the plaintiff has sustained could be compensated by

(1) 14 App. Cas. 12. (2) [1894] 2 Ch. 208, 219.
(3) [1893] 1 Ch. 116.

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damages. A stipulation for quiet enjoyment applies only to undisturbed possession: *Jenkins* v. *Jackson* (1); *Grosvenor Hotel Co.* v. *Hamilton.* (2)

NORTH J. In this case I think the plaintiff is entitled to an injunction to some extent, though I think that the injunction cannot be granted to the extent asked. The notice of motion in the first place proceeds upon the footing of there being a breach of an agreement for quiet enjoyment; but I do not understand the stipulation for quiet enjoyment to be one which means that the plaintiff is to enjoy the premises without the nuisance of a noise in the neighbourhood. A covenant for quiet enjoyment is a covenant for freedom from disturbance by adverse claimants to the property. But I think the plaintiff is entitled to relief to a limited extent in this case by reason of an obligation arising out of the signed agreement between the parties. The agreement shews, on its face, that it was made with respect to a certain flat forming part of a large building all used for this particular purpose, subject, however, to an exception which I will mention presently.

Now, looking at the agreement itself, the printed agreement, to begin with, is evidently not intended to apply to this particular flat alone. [After referring to the provisions of the agreement and the regulations appended thereto, his Lordship proceeded:—]

No one can read those provisions without seeing that there was a scheme for the general management of this building, composed of several flats, in such a way as to be suitable to the convenience of all the persons who should be tenants of the respective flats. It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants; and where the landlord enters into such an arrangement with each tenant it is obviously intended to be and is, as a matter of fact, for the benefit of all the tenants. Whether this house was built originally with any such scheme in view I do not know, and it seems to me entirely unimportant. There were, at any rate, existing a collection of flats, each

(1) 40 Ch. D. 71. (2) [1894] 2 Q. B. 836.

occupied in a similar manner, under a common management, by different tenants.

It seems to me it is a case which comes exactly within the principles laid down by Hall V.-C. in *Renals* v. *Cowlishaw* (1), and adopted by Lord Macnaghten in *Spicer* v. *Martin* (2), which the other learned Peers in that case each agreed to definitely, though Lord FitzGerald did suggest on one ground he might possibly have been adverse; but it is a very clear judgment, which has always been accepted as settling the law from that time onwards, and I think it does.

Now, what has the defendant done here which is inconsistent with that? He is proceeding to convert the building into a club. According to his own case the ground floor and part of the first floor are to be converted for that purpose. The inner quadrangle is to be covered over. As regards the upper floors, I think they are to be treated in the same way. It is clear that certain alterations are going on there now which, apparently, are inconsistent with the use of these upper floors as flats. For instance, all the kitchen ranges are being taken away from the flats on the ground that kitchens are no longer necessary there, and that something else is to be substituted. [After referring to the evidence before him, his Lordship continued :—]

Under these circumstances, what is proposed is really to convert this building, consisting of private residences and flats, one of them occupied by the lady who is the plaintiff in the action, into a large club to be occupied by members day and night. This lady's residence, instead of being private, is to be an isolated residence in the middle of and surrounded by a building occupied by what is intended to be a fashionable club. I think that is such a departure from the arrangement made with the landlord by the agreement that she is entitled to have an injunction to restrain that. I think the proper form of judgment will be to this effect: "Restrain the defendant from using or permitting the premises to be used as a club or otherwise than as residential flats, or making or permitting to be made any alterations therein with a view to such use thereof as is hereby restrained." This leads me to the exceptional

(1) 9 Ch. D. 125, 129. (2) 14 App. Cas. 24.

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matter I said I should have to mention. It appears that some portion of the lower storey has been used as offices facing the street. I have not had any explanation of the circumstances connected with that. The affidavits say that they only open to the street; but it is suggested that this may not be quite accurate. Whether it is or not is not material for this purpose. Those offices are not complained of here. I infer they have been used as offices for some time, and they are not part of the general scheme. I do not think the use of those offices during this time disentitles the plaintiff to relief; but I do not intend, or order, the discontinuance of the use of those offices as they have been used up to the present time; and I propose, therefore, to add to the words I have used, words to this effect: "but this order is not to prevent the use of the offices existing on the ground floor of the premises as heretofore, and is not to continue after the expiration of the plaintiff's tenancy."

Solicitors for plaintiff: *Walter Webb & Co.*
Solicitor for defendant: *Toovey.*

D. P.

NORTH J. 1895 Dec. 14.

In re HOOD'S TRUSTS.

Trustee Relief Act—Payment into Court by Administrator of supposed Intestate—Subsequent Discovery of Will—Revocation of Administration—Order for Payment out to Executor.

The administrator of a supposed intestate paid into court, under the Trustee Relief Act, several sums of money, part of her estate, to the credit respectively of several infants who were some of her next of kin. A will having been afterwards discovered, the grant of administration was revoked, and probate of the will was granted. Upon a petition by the executor and the ex-administrator, to which the infants were made respondents:—

Held, that there was jurisdiction to order the funds in court to be paid out to the executor, and an order was made accordingly.

But the Court required an affidavit that some legacies bequeathed by the will to the infants had been paid.

PETITION for the payment out of money which had been paid into court under the Trustee Relief Act.

On October 27, 1889, Eliza H. Jacomb Hood, spinster, died,

intestate, as was then supposed; and on December 31, 1889, a grant of administration to her personal estate was made to Robert Jacomb Hood, one of the petitioners. He paid into court under the Trustee Relief Act five sums of money, amounting altogether to 2750*l.*, to the respective accounts of five infants, who were some of the next of kin of the (supposed) intestate.

In December, 1894, a will of the (supposed) intestate was discovered, and a suit was thereupon instituted in the Probate Division, in which, on August 12, 1895, a decree was made for the revocation of the grant of administration, and probate of the will was, on August 28, 1895, granted to Francis Jacomb Hood, the other petitioner, who was appointed by the will sole executor. By the will small legacies were bequeathed to each of the five infants. The petition asked that the funds in court might be respectively transferred and paid to Francis Jacomb Hood, as executor of Eliza H. Jacomb Hood.

The petition was served upon the infants.

E. C. Macnaghten, for the petitioners.

[NORTH J. I cannot remember any case in which money which has been paid into court by a trustee under the Trustee Relief Act has been paid out upon a petition in this way.]

I have not been able to find any case in point, but on general principles I submit that the petitioners are entitled to the order which they ask for. The funds in Court ought to go to the executor.

Stanley Fisher, for the infants.

NORTH J. I cannot see any principle upon which I ought to refuse to accede to the prayer of the petition. But an affidavit must be made that the legacies to the infants have been paid.

Solicitors: *Dale, Newman & Hood.*

W. L. C.

NORTH J.
1895
Dec. 10, 21.

SYMES *v.* SYMES.

[1895 S. 3813.]

Settlement—Appointment—Construction—Remoteness—Contingent Remainder or executory Limitation.

In exercise of a power created by a marriage settlement of real estate (executed in 1819) the husband and wife by deed (executed in September, 1848) jointly appointed that the estate should after the death of the survivor of them (they being tenants for life under the settlement) be to the use of the three children then born (naming them) of the only son of the marriage, and all other his child and children who should be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain the age of twenty-five, equally as tenants in common. But in case either of the three named children of the son and any such other child and children as aforesaid should die under twenty-five, then immediately after his or her death to the use of the survivors or other of them, their, his, or her heirs and assigns. Provided that, in case the appointment intended to be thereby made to the after-born children of the son should from any cause fail of effect, the appointors did thereby further declare that the deed should operate as an appointment of the hereditaments to the three then born children of the son, or such of them as should attain twenty-five, their respective heirs and assigns. The husband died in 1867, and his widow died in November, 1873. There were seven children of the son, all of whom were then living, but only the three elder ones had attained twenty-five. The other four attained twenty-five subsequently:—

Held, that the limitations of the deed of appointment took effect as legal contingent remainders on the death of the widow; that each of the seven children of the son took one-seventh of the property for life; and that the three who had attained twenty-five at the death of the widow took the remainder in fee (subject to the life estates) equally between them as tenants in common.

In re Lechmere and Lloyd (18 Ch. D. 524) distinguished.

SPECIAL CASE stated for the opinion of the Court under Order XXXIV., r. 1, of the Rules of the Supreme Court, 1883, raising questions as to the validity of a deed of appointment dated September 2, 1848, and as to the interests taken by the plaintiff and the defendants respectively in the property thereby appointed.

By a settlement dated February 3, 1819, and made upon the

marriage of David Symes with Ann Pidsley, real estate of the husband was limited to the use of himself and his assigns during his life or until such event as therein mentioned (which did not happen), and from and after his decease or the happening of such event to the use of trustees, their heirs and assigns, during the lives of the husband and wife, and the life of the survivor, upon trust as therein mentioned. And after the determination of the life estate of the husband or the happening of such event as aforesaid, and after the decease of the wife, to the use of trustees for the term of 1000 years upon certain trusts which never arose. And, subject to the said term and the trusts thereof, to the use of such child or children of the marriage, or the issue of any such child or children, which issue should be living during the joint lives of the husband and wife, for such estate or estates, and on or at such age or respective ages, and if more than one in such shares and proportions, as the husband and wife should jointly during their joint lives by deed appoint. And, in default of and subject to any such appointment, to the use of the first and every other the son or sons of the marriage successively in tail male, with remainders over.

There was only one child of the marriage, namely, John David Symes (the elder). He married in 1843, and there were seven children of his marriage—namely, John David Symes (the younger), born on June 8, 1844; William Henry Symes, born on December 13, 1845; Mary Elizabeth Symes, born on March 9, 1848; Annie Pidsley Symes, born on September 2, 1850; Lucelle Jeannette Symes, born on July 10, 1852; Frederick George Symes, born on September 1, 1854; and Edith Emily Symes, born on January 17, 1863.

On September 2, 1848, David Symes and Ann Symes executed a deed-poll, whereby, in exercise of the power given to them by the marriage settlement, they jointly appointed that the real estate comprised in the settlement should from and immediately after the decease of the survivor of them be to the use of John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes, and all other the child or children of John David Symes (the elder) who should happen

NORTH J. 1895 SYMES v. SYMES.

to be living at the decease of the survivor of David Symes and Ann Symes, and to the heirs and assigns of such of them as should attain the age of twenty-five years, equally as tenants in common and not as joint tenants. But, in case either of them the said John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes, and any such other child or children as aforesaid, should depart this life under the age of twenty-five years, then immediately after such his or her decease to the use of the survivors or other of them, their, his, or her heirs or assigns. Provided always, that, in case the appointment intended to be thereby made to or in favour of the afterborn children of John David Symes (the elder) should from any cause fail of effect, then David Symes and Ann Symes in further exercise of the said power did thereby further declare and appoint that the deed-poll should operate as an appointment of the hereditaments to John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes, or such of them as should attain the age of twenty-five years, their several and respective heirs and assigns.

David Symes died on May 24, 1867, and his widow Ann Symes died on November 5, 1873.

John David Symes (the elder) died on May 3, 1863.

All his seven children were living at the date of the death of Ann Symes, but the three elder children only had then attained the age of twenty-five.

John David Symes (the younger) died on June 19, 1893, having devised all his real estate to his wife. He left no son him surviving.

William Henry Symes died on June 25, 1892, having devised his real estate to trustees.

Frederick George Symes died on July 21, 1894, having devised his real estate to a trustee.

The plaintiff was the eldest son of William Henry Symes, and was the heir in tail male of John David Symes (the elder). The plaintiff was born on January 11, 1879.

The defendants were the representatives of the three deceased sons, the four daughters, and their mortgagees. Mary Elizabeth Symes married John Done.

Vernon Smith, Q.C., and *Waggett*, for the plaintiff. The effect of the appointment is that the seven grandchildren took estates for life as joint tenants, and then a contingent interest is given to such of them as shall attain twenty-five: *In re Atkinson* (1); *In re Tiverton Market Act.* (2) This contingent interest is too remote, and it therefore fails: *Blight* v. *Hartnoll.* (3)

Swinfen Eady, Q.C., and *Curtis Price*, for the defendants. A remainder in fee is given to each of the grandchildren on attaining twenty-five, and this remainder coalesces with the life estate.

But if the remainders do not coalesce with the life estates, still the limitations are perfectly good. These are legal contingent remainders, and they must vest either during the prior life estate or immediately upon its termination. If they do this they are perfectly valid. The estate in remainder goes to such of the grandchildren as had attained twenty-five at the death of the tenant for life, Mrs. Symes. They were all born in her lifetime. They are tenants in common for life.

Vernon Smith, Q.C., in reply, referred to *In re Frost.* (4)

Cur. adv. vult.

1895. Dec. 21. NORTH J. The question in this case is, What is the true construction of the deed of appointment of September 2, 1848? [His Lordship stated the effect of the settlement and the appointment, and continued:—]

Mrs. Symes survived her husband, and the appointment took effect in possession on her death on November 5, 1873. There were seven children of the only son of the marriage, all of whom were living at her death. The three elder children were born before the appointment, and had attained twenty-five before her death. The four others were not born till after the date of the appointment, and at the death of Mrs. Symes none of them had attained twenty-five. The first limitation in the appointment with which we have to deal is clearly a legal contingent remainder. It is to the use of the children of the son who should

(1) [1892] 3 Ch. 52.
(2) 20 Beav. 374.
(3) 19 Ch. D. 294.
(4) 43 Ch. D. 246.

NORTH J. 1895 SYMES v. SYMES.

be living at the death of the survivor of the husband and wife, and that is perfectly good because it must vest, if it vests at all, upon the death of Mrs. Symes, the tenant for life, and she was living at the date of the settlement. The grandchildren who were living at her death are to take immediate vested interests, and that is a perfectly good legal limitation. It was clearly intended that they should take immediate interests, and those interests are obviously life estates, for there are no words of inheritance: and by virtue of the subsequent clause the interest of any of the grandchildren who may die under twenty-five comes to an end. Then there is a limitation in remainder to the heirs and assigns of such of the grandchildren as shall attain twenty-five. This is not a limitation to the same class as that to which the life estates have been limited. It is a limitation in fee to such members of the previously named class as shall attain twenty-five. It might include all the members of the previous class; but it is a different class. This limitation, again, is clearly a contingent remainder, and it must vest or fail at the time when the prior life estate comes to an end, that is, upon the death of Mrs. Symes, and it would vest in those grandchildren who had attained twenty-five at the time at which it must either vest or fail. It is clear, therefore, that the remainder vested upon the death of Mrs. Symes in those three grandchildren who had then attained twenty-five, to the exclusion of the other four.

There are, no doubt, cases to be found in which words somewhat similar to those of the present appointment have been construed as an executory devise and not as a contingent remainder; but that was because in the instruments then in question there were words which shewed that the limitations were clearly intended to operate as executory devises. In the present case there are, in my opinion, no words which justify me in construing the limitations as executory uses. One example of the cases to which I am referring is *In re Lechmere and Lloyd.* (1) There the devise was to E. during her life, and from and after her death to such of her children living at her death as "either before or after her decease" should, being males, attain

(1) 18 Ch. D. 524.

twenty-one, or, being females, attain that age or marry, in fee simple, if more than one as tenants in common. E., having survived the testatrix, died, leaving seven children, five only of whom had then attained twenty-one. There the gift was obviously intended for the benefit of all the children who should at any time attain twenty-one; and it was held by Jessel M.R. that the five children took vested interests liable to open to let in the two infants on their fulfilling the conditions of the will. But the Master of the Rolls, in his judgment, put the very case with which I have now to deal, and said (1): "If the devise be to A. for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in *Festing* v. *Allen*." (2) The principle of this decision was followed in *Miles* v. *Jarvis* (3) and in *Dean* v. *Dean*. (4) And, inasmuch as the condition of attaining the prescribed age must be fulfilled at the determination of the prior life estate, it is immaterial whether the prescribed age is twenty-one or twenty-five. The result is that the whole gift made by the appointment is complete, and nothing fails to take effect. Each of the seven grandchildren takes one-seventh of the estate for life, with remainder in fee to the three elder grandchildren, in equal shares as tenants in common. I doubt whether the appointors understood exactly what they were doing; and I think the subsequent proviso shews this. But, though it does not take effect, it shews an obvious intention that, if all the seven grandchildren could not take, at any rate the three who were living at the date of the appointment should do so. I have already said I think that the grandchildren who had not attained twenty-five at the death of the tenant for life take estates for life only, and in my opinion they take as tenants in common, and not as joint tenants, each taking one-seventh share of the property. In the case of the three grandchildren who take remainders in fee, their respective life estates will merge in such remainders.

(1) 18 Ch. D. 528.
(2) 12 M. & W. 279.
(3) 24 Ch. D. 633.
(4) [1891] 3 Ch. 150.

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MINUTE OF JUDGMENT.—Declare that the appointment was not wholly invalid, but that it operated to create estates in the property as follows, viz., in J. D. Symes the younger, W. H. Symes, Mrs. Done, and the four other children (naming them) of J. D. Symes, the elder, as tenants in common during their respective lives, with remainder as to one undivided seventh share to each of the three elder children (naming them) in fee simple, and as to the remaining four undivided seventh shares to the three elder children (naming them) as tenants in common in fee simple in equal thirds.

Solicitors: *Guscotte, Wadham & Bradbury; Yarde & Loader.*

W. L. C.

NORTH J.
1895
Dec. 14.
1896
Jan. 11.

JENKINS *v.* HOPE.

[1895 J. 1524.]

Practice—Injunction—Offer of Undertaking by Defendant—Costs.

In an action to restrain the infringement of a patent a defendant, on being served with the writ, offered to undertake not to infringe, to give the other relief claimed by the writ, and to pay the plaintiff's costs. Notwithstanding this offer the plaintiff delivered a statement of claim and particulars of breaches. The defendant then delivered a defence; and the plaintiff moved for judgment in the terms of the statement of claim:—

Held, that the plaintiff ought to have accepted the undertaking offered; and, on the defendant's giving the undertaking, the Court declined to grant an injunction, giving to the plaintiff costs down to the date of the offer and the costs of the day's appearance, and to the defendant the other costs subsequent to the offer.

MOTION for judgment.

The action was brought to restrain the infringement by the defendants of the plaintiff's patent, No. 6821 of 1894, for "Improvements in hats, caps, and the like." The defendants were Edwin Hope, who traded as the Denton Hat and Cap Manufacturing Company, and Wilson & Stafford, Limited.

By the writ, issued on September 30, 1895, the plaintiff claimed an injunction to restrain the defendants, their servants, &c., from infringing the patent; damages or an account of profits; and delivery up or destruction of all caps made in infringement of the plaintiff's patent.

On October 4, 1895, immediately after Wilson & Stafford, Limited, had been served with the writ, their solicitors wrote to the plaintiff's solicitors that their clients' sales of the caps had been very small; that they had sold none for some time,

and intended to sell no more. On the next day an appearance was entered for Wilson & Stafford, Limited.

On October 24, 1895, their solicitors wrote to the plaintiff's solicitors as follows :—

"Our clients purchased the goods of which complaint is made in the ordinary course of business, and in entire ignorance of the plaintiff's patent. The matter is of no interest to our clients, as the goods they have sold amount in the whole to 9*l.* 9*s.* 5½*d.* Our clients are prepared to account to the plaintiff for the profits they have made on the sale of these goods, and will also deliver up to the plaintiff, or destroy, all caps in their possession which are alleged to be an infringement of the plaintiff's patent, and will pay your costs of the action. Our clients will also give their undertaking that they, their servants, &c., will not infringe the plaintiff's patent.

"Of course, after this letter it will be quite unnecessary to take any further proceedings as against our clients; but, should the plaintiff see fit to do so, we shall bring this letter to the notice of the Court, with the view of obtaining such relief as our clients are entitled to."

Notwithstanding this letter the plaintiff, on November 9, delivered a statement of claim and particulars of breaches to Wilson & Stafford, Limited.

The statement of claim claimed an injunction to restrain the defendants, their and each of their servants, &c., from manufacturing, selling, offering for sale, and advertising for sale any caps made in infringement of the plaintiff's patent, and from in any other manner infringing the patent, and the other relief claimed by the writ.

Wilson & Stafford, Limited, on November 27, delivered a defence, in which they set forth the letter of October 24, and said that they had always adhered, and still adhered, to the offer therein contained, and they submitted that, having regard to that offer, and to the character of the infringement of the plaintiff's patent committed by them, the plaintiff should pay their costs since the date of the letter.

By his notice of motion the plaintiff asked that he might be at liberty to enter judgment against Wilson & Stafford, Limited, in

NORTH J. 1896 JENKINS v. HOPE.

the terms of the statement of claim and of the letter of October 24, and also that a perpetual injunction in the terms of the statement of claim might be granted against the other defendant.

The other defendant did not now appear, but it was stated that he would consent to a perpetual injunction against himself.

A. J. Walter, for the plaintiff. The plaintiff is entitled to an injunction against both the defendants.

A. H. Jessel, for the defendants Wilson & Stafford, Limited. The plaintiff ought to have been satisfied with the undertaking which we offered to give, and should not after that offer have continued the proceedings against us. He ought to pay our costs subsequent to the date of that offer: *Walter* v. *Steinkopff* (1); *American Tobacco Co.* v. *Guest*. (2)

A. J. Walter, in reply. The plaintiff is at any rate entitled to the costs of to-day's hearing; he must have come to the Court for the purpose of having the defendants' undertaking given in due form.

NORTH J. said that the consent of the defendant Hope must be given by counsel on his behalf. The plaintiff ought under the circumstances of this case to have been satisfied with the undertaking offered by the other defendants. The Court had a discretion as to granting an injunction, and under these circumstances he should decline to grant it, upon the defendants now giving the undertaking which they had offered.

As to the costs, the plaintiff must have come to the Court in order that the defendants' undertaking might be given in due form. He would therefore have the costs down to the date of the defendants' offer, and also the costs of this day; and the defendants Wilson & Stafford, Limited, would have their costs subsequent to the offer other than the costs of the day.

1896. Jan. 11. *Bowen*, for the defendant Hope, now consented to a perpetual injunction.

Solicitors: *J. T. Lewis; Emanuel & Simmonds; Rowcliffes, Rawle & Co.*

(1) [1892] 3 Ch. 489. (2) [1892] 1 Ch. 630.

W. L. C.

NORTH J.
1896
Jan. 16.

In re WISE.
JACKSON *v.* PARROTT.

[1895 W. 1587.]

Infant—Maintenance—Trust—Validity—Remoteness—Discretion of Trustees—Time for Exercise—Power to resort to Past Accumulations—Will—Construction.

A testator bequeathed to trustees the residue of his personal estate, upon trust for investment and to apply the whole income, or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of the testator's sister, until they should respectively attain the age of twenty-three, and to accumulate and invest as capital any unapplied portion of the income.

And upon further trust, as to both capital and income of the investments, to stand possessed thereof upon trust for the child, if only one, or all the children, if more than one, of the sister who, either before or after her decease, should attain twenty-three (such children, if more than one, to take in equal shares as tenants in common), and the issue of such of the children of the sister as might be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living.

The testator died in February, 1888. His sister, who was a widow, had only two children, a daughter who attained twenty-three on March 10, 1892, and a son who was born on May 28, 1874. On January 30, 1889, upon a summons issued by the trustees of the will, the sister's two children being defendants, the Court was of opinion that the bequest of the residuary personalty to her children was void for remoteness, but that the persons to take the residuary personalty could not be determined till her death. And it was ordered that the trustees should accumulate the surplus income until further order. The trustees had never applied any part of the income under the discretionary trust for maintenance, &c., but had accumulated the whole in accordance with the order. Upon a summons in 1895 by the sister's two children :—

Held, that the trust for maintenance was distinct from the trust of the capital of the residuary personalty, and was valid; that the trustees could now exercise the discretion given to them by the will; that in their absolute discretion they might now apply all or any part of the income which accrued down to March 10, 1892, and of the accumulations thereof, in or towards the maintenance, &c., of the two plaintiffs, and similarly might apply all or any part of the income from March 10, 1892, and of the accumulations thereof, and of the future income and accumulations until the younger plaintiff should attain twenty-three, for his maintenance, &c.

ORIGINATING SUMMONS by Florence Mary Jackson and Frederick William Jackson, the only two children of Margaret

NORTH J. 1896 *In re* WISE. JACKSON *v.* PARROTT.

Hine Jackson, a sister of William Wise, deceased, as plaintiffs, against the trustees and executors of his will, and a brother and a niece of the testator, as defendants, for the determination of the questions whether a discretionary trust contained in the testator's will for the maintenance, education, &c., of the children of Margaret Hine Jackson was a valid trust, and whether under the circumstances the trustees could now exercise the discretion given to them by the will.

The testator, by his will, dated October 19, 1887, appointed W. S. Parrott and James Mortimer executors and trustees thereof, and, after bequeathing some legacies, he gave and devised all his real estate to the trustees in fee, upon trust to receive the rents and repair and insure, and out of the surplus to pay to his brother George Wise the annual sum of 41*l.* 12*s.* during his life, and to his sister Margaret Hine Jackson the annual sum of 208*l.* during her life, and to dispose of any surplus of the rents as part of his residuary personal estate. And on the death of the survivor of George Wise and Margaret Hine Jackson, upon trust for the child, if only one, or all the children, if more than one, of Margaret Hine Jackson who, either before or after her decease, should attain twenty-three years of age (such children, if more than one, to take in equal shares as tenants in common) and the issue of such of the children of his said sister as might be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living. And the testator bequeathed all the residue of his personal estate unto his trustees upon trust for sale and conversion, and to invest the net proceeds, and to stand possessed of the income arising from the investments upon trust to apply the whole, or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of Margaret Hine Jackson, until they should respectively attain the age of twenty-three years, and to accumulate and invest as capital any unapplied portion of such income. And upon further trust as to both the capital and income of such investments to stand possessed thereof upon trust for the child, if

only one, or all the children, if more than one, of Margaret Hine Jackson who, either before or after her decease, should live to attain the age of twenty-three years (such children, if more than one, to take in equal shares as tenants in common), and the issue of such of the children of his said sister as might be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living. The will contained a gift over in the event of the death without issue of all the children of Margaret Hine Jackson in her lifetime.

The testator died on February 26, 1888.

On January 30, 1889, an order was made by North J. upon an originating summons, in which the trustees of the will were plaintiffs, and the two children of Margaret Hine Jackson (who were both then infants) and others were defendants, by which the Court expressed an opinion that the effect of the devise of the real estate contained in the testator's will to the children of Margaret Hine Jackson could not be determined until the deaths of both the annuitants, Mrs. Jackson and George Wise. And the Court was also of opinion that the bequest of the residuary personalty to those children was void for remoteness, but that the persons to take the residuary personalty could not be determined until the death of Mrs. Jackson. And it was ordered that the plaintiffs should accumulate the surplus income of the real and residuary personal estate until further order.

The present plaintiffs were the only two children of Margaret Hine Jackson, who was a widow. Florence Mary Jackson attained twenty-three on March 10, 1892. Frederick William Jackson was born on May 28, 1874, and had therefore attained twenty-one, but had not attained twenty-three.

The trustees had never applied any part of the surplus income of the testator's real and residuary and personal estate under the discretionary trust for maintenance. Since the order of January 30, 1889, they had accumulated the surplus income in accordance with that order. George Wise died in May, 1892.

Swinfen Eady, Q.C., and *Dickinson*, for the plaintiffs. The trust for maintenance out of the income can be separated from

NORTH J. 1896 *In re* WISE. JACKSON *v.* PARROTT.

the gift of the capital which has been held void for remoteness, and is perfectly valid. It is an immediate gift, and is at any rate valid for the period of twenty-one years from the death of the testator: *Gooding* v. *Read* (1); *In re Watson.* (2) The trustees have never yet exercised their discretion as to the application of the income; all they have done is, in accordance with the order of the Court, to accumulate the income by way of interim investment, until the Court should have decided as to the validity of the trust. It is therefore competent to the trustees now to exercise the discretion given to them by the will, and in doing so they may apply the accumulations of past income as well as income accruing in the future: *Edwards* v. *Grove.* (3) The trustees can exercise their discretion in applying the income accrued up to the time when the elder plaintiff attained twenty-three, and the accumulations of that income, towards the maintenance of both plaintiffs, and the income accrued from that date and its accumulations, and also the future income, in maintaining the younger plaintiff until he shall attain twenty-three. In *Wilson* v. *Turner* (4) the trustees did not exercise any discretion, but simply paid the whole income of a trust fund to the father of an infant.

Stallard, for one of the next of kin. The trustees may have a discretion as to the application of the income which is to accrue in the future, but they cannot now exercise any discretion with regard to the income which has already accrued and has been invested. The present plaintiffs were before the Court when the order directing the accumulation was made. They have been maintained, and the trustees cannot exercise their discretion in now paying for their past maintenance: *Wilson* v. *Turner.* (4)

E. C. Macnaghten, for another of the next of kin, submitted the question to the Court.

Chaster, for the trustees.

NORTH J. The plaintiffs on this originating summons, who claim to be interested as beneficiaries under the testator's will,

(1) 4 D. M. & G. 510.
(2) W. N. (1892) 192.
(3) 2 D. F. & J. 210.
(4) 22 Ch. D. 521.

have not only served the trustees, but have also made two of the next of kin parties. It was not necessary to do this; but the Court probably would not have dealt with the matter without requiring, if none of the next of kin had been here, that one or more of them should be made parties. Two of them, however, have been made parties, and I do not think it is necessary to make any order binding the rest. The General Orders provide for such a summons as this being dealt with in the absence of some of the parties, and I will deal with the present summons in that way.

As regards the question of construction, I thought on reading the will that it was reasonably clear that the trust for the maintenance out of the income of a fund up to the age of twenty-three of persons who are described was an entirely different and separate trust from the trust of the capital of the fund for the same persons on their attaining the age of twenty-three. And two cases have been cited which shew that my opinion, arrived at independently on this will, is identical with the view which has been taken by the Court in other similar cases. One of those cases, *Gooding* v. *Read* (1), in the Court of Appeal, was very like the present case; and the other, *In re Watson* (2), before Chitty J., was even stronger. In my opinion, therefore, this trust for maintenance is good. I can see nothing to make it void in any way. I have no doubt that the separate trust of the capital is bad, because there are inherent defects in the way in which it has been created. Nearly eight years have now elapsed since the testator died, and during the whole of that time the income has been accumulated. I felt at first some difficulty in saying that the trustees had not exercised their discretion as to the application of the income, for I thought that they had deliberately chosen to capitalize it, and that that in itself was, at any rate primâ facie, an exercise of the discretion to the effect that the income was not required for maintenance, and ought to be accumulated. I had not then given due weight to one clause in my former order declaring the construction of the will on points which are not now in issue. It was then ordered that "the plaintiffs, the trustees of the will, do

(1) 4 D. M. & G. 510. (2) W. N. (1892) 192.

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accumulate the surplus income of the real and residuary personal estate until further order." That is, the income which was not applied under the trusts of the will was not to be retained by the trustees uninvested, but was to be accumulated until further order. If the parties had then contemplated the question which has now arisen, probably some words might have been inserted in the order giving liberty to any person to apply as to the income. That, however, was not done, as nothing was said about it; but the positive direction to accumulate the income until further order bound the trustees until it was varied, and they had no longer any discretion as to applying any part of the income for maintenance without some further order of the Court. Under these circumstances, it seems to me that the trustees, in capitalizing the income, have not exercised any discretion, and that it is now open to them to exercise the discretion which was given to them by the trust in question, unless there is anything else in the will which prevents them doing so. The question is whether they can apply the income accrued in past years for maintenance after those years have expired. I can see no difficulty in the present case in their doing so. The question whether, if the trustees had exercised their discretion and had capitalized the income, they could afterwards resort to the capitalized accumulations for maintenance, does not now arise. The trustees have not in fact exercised their discretion for the reason which I have stated, and it seems to me that it is open to them to exercise it now.

It does not seem to me very material whether they exercise their discretion now or not, because if they have a discretion which they do not exercise the Court would exercise it for them. In exercising it I should, of course, consult the trustees, and should pay great attention to what they might say they would have done if they had not been directed to invest the surplus income, and it would not really make any difference whether I exercised the discretion having regard to their advice, or whether I left them to do it. But I think that the discretion is not gone altogether. I can find nothing in the will to prevent their exercising their discretion at any time, and, in my opinion, they may exercise it now.

The fact that the daughter attained twenty-three four years ago does not, in my opinion, deprive the trustees of the power of exercising the discretion which they have not yet exercised with regard to the income which accrued between the testator's death and the date of her attaining twenty-three. The fact that she was maintained and educated during that period is a point to which they will no doubt give due consideration when they come to exercise their discretion; but, in my opinion, they have a discretion.

MINUTE OF ORDER.—Declare that the trustees may now in their absolute discretion apply all or any part of the income of the residuary personal estate (including the income arising from the investment of rents of the real estate) which accrued down to March 10, 1892, and of the accumulations thereof, in or towards the maintenance, &c. (following words of will). Similar direction as regards income and accumulations from March 10, 1892, and of future income and accumulations until plaintiff F. W. Jackson attains twenty-three for the maintenance, &c., of that plaintiff.

Solicitors: *Hickin, Smith & Capel-Cure; R. E. Bartley; Collyer-Bristow, Russell, Hill & Co.; Ingle, Holmes & Sons.*

W. L. C.

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[1895 S. 3499.]

Trustee—New Trustees of Will—Power of Appointment—Tenant for Life Donee of Power—Trustee "Abroad"—Old Trustee Executor—New Trustee Solicitor for Tenant for Life.

Under a will containing a settlement of real and personal estate the power to appoint new trustees became exercisable in case (inter alia) either of the trustees should "be abroad." There were three trustees, and they were also the executors of the will. P., one of them, after acting with his co-trustees for ten years, in 1893 went to reside in Normandy, taking a five years' lease of a house there, and coming occasionally to England upon the trust business. In 1895 the tenant for life, who was the donee of the power, appointed T. W., her own solicitor, to be a new trustee in the place of P.

Upon a summons taken out by P. and the other two original trustees, asking the opinion of the Court whether the appointment was valid:—

Held, (1.) that P. was "abroad" within the meaning of the power; (2.) that as, upon the facts, no part of the testator's estate remained vested in P. as executor virtute officii, his position was merely that of a trustee; and (3.) that although the appointment of the solicitor of the tenant for life as trustee of the settlement was not one which the Court itself would have either made or sanctioned, yet, as T. W. was in other respects a fit and proper person, as none of the beneficiaries objected, and as the tenant for life did not appear to have acted capriciously, the Court could not treat the appointment as invalid, though it would give P. liberty to apply, so that his right of indemnity as legal personal representative should not be prejudiced in case it should turn out that any liability on his part still existed.

In re Kemp's Settled Estates (24 Ch. D. 485) and *In re Marquis of Ailesbury* ([1893] 2 Ch. 345) observed upon.

ADJOURNED SUMMONS.

George Harry, Earl of Stamford and Warrington, by his will, dated January 26, 1875, devised four estates in Staffordshire, Leicestershire, Cheshire, and Lancashire (called his Shire estates), to the use of Arthur F. Payne, Robert Cocks, and Henry Hall, their executors, administrators and assigns, during the life of his wife, Catherine, Countess of Stamford and Warrington, on certain trusts for her benefit; and he directed the

trustees, during the continuance of the estate limited in the said Shire estates upon trust for the benefit of his wife, to set apart out of the rents and profits of any or either of those estates as the trustees should in their discretion think fit the yearly sum of 12,000*l.*, and to apply the same in aid of his personal estate, in or towards the discharge and satisfaction of his funeral and testamentary expenses and debts, and the legacies and annuities given by his will, and of the mortgage debts charged upon the said four Shire estates or any of them at the time of his decease, the time, order, mode, or priority of such application to be in the absolute discretion of his trustees. After the death of the Countess the testator devised his Shire estates to uses in favour of different families; but, in respect of the Lancashire estates, he created a term therein of 1000 years, and limited the same to the trustees upon trust, after payment of all annual sums charged thereon, to apply the rents thereof in aid of his personal estate, first in or towards discharge and satisfaction of his funeral and testamentary expenses and debts, and the legacies and annuities given by his will, and next in or towards the discharge and satisfaction of the mortgage debts and gross sums charged upon the said four Shire estates at the time of his decease and remaining unpaid. The testator then bequeathed his residuary personal estate to the same trustees upon trust to convert the same into money, to pay thereout his funeral expenses, debts, and the legacies and annuities bequeathed by his will, and to apply the surplus, if any, in or towards the discharge of mortgage debts, charges, or incumbrances affecting the four Shire estates; and if any surplus remained after that, they were to stand possessed thereof in trust for the Countess absolutely. The testator then, after giving various legacies, some of which were specific, appointed A. F. Payne, R. Cocks, and H. Hall to be the general trustees of his will, with powers of sale and management, and also appointed them his executors; and he declared that, in case any or either of his trustees, or any trustee thereafter appointed, should die in his lifetime, or decline to act, or, having survived him and acted, should die "or be abroad," or desire to be discharged, or refuse or become incapable to act, then and in

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every such case it should be lawful for the Countess during the continuance of the estates limited in trust for her benefit, and afterwards for the surviving or continuing trustees or trustee, or the executors of the last surviving or continuing trustee, to appoint a new trustee or new trustees.

The testator died on January 2, 1883, and his will was duly proved by his executors, all of whom were still living. His personal estate was insufficient to pay his debts in full, and had been exhausted. His debts on simple contract had been paid, but there remained mortgage debts charged upon the four Shire estates to the amount of about 800,000*l.*, and annuities secured by the personal covenant of the testator to the extent of nearly 4000*l.*, for which his estate was still liable. The executors had assented to the specific legacies, and had paid all the pecuniary legacies, and there was no personal estate available for distribution remaining in their hands.

Down to the last meeting of the trustees on July 29, 1895, all the three trustees had acted together; but on August 8, 1895, Sir Thomas Wright, the solicitor of the Countess, had forwarded to Messrs. Bower & Co., the solicitors of the trustees, the draft of a proposed appointment of himself as trustee in the place of Mr. Arthur F. Payne, who was therein stated to be abroad within the meaning of the power to appoint new trustees. The member of the firm of Messrs. Bower & Co. who attended to the business of the trust was not in town at the time, so the receipt of the draft appointment was acknowledged without comment. Counsel were consulted with reference to it; but before an opinion was obtained, and without further communication with the trustees, the Countess, on August 28, 1895, executed the deed (a draft of which had been so forwarded), and thereby appointed Sir Thomas Wright to be a trustee of the will of the testator for all the purposes thereof in the place of Mr. Arthur F. Payne, and made a declaration vesting in Messrs. Robert Cocks and Henry Hall and Sir Thomas Wright, as trustees of the will, the real and personal estate subject to the trusts thereof, for all the interest of the original trustees.

The original trustees were none of them parties to this deed.

This was a summons taken out by all the original trustees of the will, asking for the determination of the question whether, having regard to the circumstances, this indenture of August 28, 1895, was a valid appointment of a new trustee of the testator's will.

It appeared from the evidence that Mr. Payne had all along acted with his co-trustees in the administration and management of the testator's estate, and in one of his affidavits filed in this matter he made the following statement:—

"In or about the year 1884 the state of my wife's health rendered it necessary for her to leave England during the winter months, and from that time until I took my present residence at Lisieux we lived alternately in England and in Paris, I myself being more in England than abroad. I took my residence in Lisieux in the year 1893, and I have principally resided there up to the present time . . . . Notwithstanding the facts hereinbefore stated, I have been able to attend to and in fact always attended to the general management of the estate. With a few exceptions I have attended all the meetings of the trustees, and I have moreover always been in constant correspondence with my co-trustees, and with Messrs. Bower & Co., who have kept me conversant with the matters they respectively attend to." Then with reference to Lisieux, where he was residing, he stated: "This place is about forty miles distant from Havre and fifty or sixty miles from Rouen. Letters sent to me from London by post are received by me the next day. I can leave Lisieux at 4.30 P.M. and be in London by 8 o'clock the next morning. There are four routes to London," which he named, and then continued: "I have no immediate intention of leaving the place, but after the expiration of my present lease, which has about three years to run, we shall probably return to England, as my wife's health has much improved."

It appeared that the special management of the Lancashire estates had been carried on by Mr. Hall, and that of the Cheshire estates by Mr. Cocks, both of these gentlemen having acted as agents of the late Earl during his life. The Leicestershire estates were under the special management of Sir Thomas

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Wright, who was a solicitor at Leicester, and had been appointed agent for that purpose a few years after the Earl's death, and for some time past had acted as solicitor for the Countess, his widow. Another agent had been appointed for the Staffordshire estates. Mr. Payne in his evidence further stated that it had never been suggested until August 10, 1895, that his residence abroad had in any way interfered with the performance of his duties as trustee, or rendered it desirable or expedient that he should cease to be trustee; and that he had always been and still was willing to act; and that no request had ever been made to the Countess by the persons entitled in remainder to appoint a new trustee in his place.

Buckley, Q.C., and *Austen-Cartmell*, in support of the summons. This appointment is invalid. Mr. Payne is not and has not been "abroad" within the meaning of the expression in the will, and the power to appoint a new trustee in his place has never arisen.

The expression must be taken to refer only to such a permanent residence "abroad" as shall unfit the trustee for the due performance of his duties, and cannot nowadays be held to apply to a temporary residence within a few hours of England: *In re Moravian Society* (1); *In re Arbib and Class's Contract.* (2) But, even if Mr. Payne is "abroad" within the meaning of the power, the tenant for life, who is the donee of it, cannot properly appoint her own solicitor to be a trustee, for in such a position it would be extremely difficult for him properly to discharge his duties and to hold an even hand in any question which might arise between tenant for life and remainderman, or between the tenant for life and the trustees. It is obvious that his interest might conflict with his duty: *In re Kemp's Settled Estates* (3); *Wheelwright* v. *Walker* (4); *In re Tempest* (5); *Sugden* v. *Crossland* (6); *In re Skeats' Settlement.* (7) As a general rule, the Court will neither make nor sanction an appointment of the

(1) 26 Beav. 101.
(2) [1891] 1 Ch. 601.
(3) 24 Ch. D. 485.
(4) 23 Ch. D. 752.
(5) L. R. 1 Ch. 485.
(6) 3 Sm. & Giff. 192.
(7) 42 Ch. D. 522.

solicitor of the tenant for life as a trustee of the settlement. It is true that in *In re Marquis of Ailesbury* (1), the solicitor of the tenant for life was one of several trustees appointed by the Court for the purposes of the Settled Land Acts; but that appointment did not militate against the general rule, for the circumstances were altogether exceptional, and fully justified the appointment.

Lastly, Mr. Payne was not only trustee, but executor also, and there are still liabilities affecting the testator's estate. He assented to the legacies on the assumption that the 12,000*l.* a year would be treated as assets in the hands of the executors. The personal estate is exhausted, and he ought not to be deprived of his office of trustee against his will, or of his right of indemnifying himself out of the trust funds.

Henry Fellows, for the successive tenants for life in remainder of the Leicestershire estates;

Borthwick, for the infant tenant in tail of the Staffordshire estates;

W. A. Peck, for the tenant for life of the Staffordshire estates; and

L. A. Wallington, for the present Earl of Stamford, being satisfied with either Mr. Payne or Sir Thomas Wright, took no part in the argument.

Hastings, Q.C., and *B. Fossett Lock*, for the Countess of Stamford. The question is not whether the Court will make or sanction the appointment of a trustee who is the solicitor of the tenant for life, but whether the Court will set aside such an appointment after it has been made by the tenant for life. So this is in effect an action to set aside the deed of August 28, 1895. Now, although it is not the usual practice for the Court to appoint the solicitor of the tenant for life, yet when such an appointment has been made outside the court by a tenant for life in the bonâ fide exercise of a power, the Court will not interfere with it, but will hold that the trustee has been validly appointed: *In re Norris*. (2) The decision in *In re Skeats' Settlement* (3) was merely that the donee of a power of appointment

(1) [1893] 2 Ch. 345, 360. (2) 27 Ch. D. 333, 341.
(3) 42 Ch. D. 522.

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cannot appoint himself; and *In re Newen* (1) was to the like effect. This being so, it is clear upon the evidence that Mr. Payne was "abroad" at the date of Sir Thomas Wright's appointment so as to bring the power into operation, and to entitle the cestui que trust to have a new trustee appointed in his place: *O'Reilly* v. *Alderson*. (2) As to the objection that Mr. Payne is one of the executors of the testator, and therefore cannot be removed from his office of trustee, that is not applicable in the present case; because here the personal estate is exhausted, there is nothing vested in him virtute officii, and he has no executorial duties to perform. Moreover, there is no suggestion whatever that Sir Thomas Wright himself is otherwise than a most fit person to be a trustee.

Grosvenor Woods, Q.C., and *Blakesley*, for Sir Thomas Wright. Mr. Payne cannot be under any possible liability, for there has been no loss, maladministration, or breach of trust connected with the estates. The 12,000*l.* a year did not come to the hands of Messrs. Payne, Cocks & Hall as executors, but as trustees. The language of s. 50 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), indicates that there may be duties devolving upon trustees which are in the nature of administration.

Austen-Cartmell, in reply. In *O'Reilly* v. *Alderson* (2) it was admitted that the trustee was permanently resident abroad. Here his residence abroad is merely temporary, and he is frequently in England. There is no case in which temporary residence abroad has been held to give rise to a power of this kind: Farwell on Powers (1st ed. p. 519; 2nd ed. p. 649). One of the most important duties of a trustee is to keep a check upon the tenant for life, and that check cannot exist where the trustee is his solicitor. Upon the last point the Court cannot remove an executor; and I submit that a trustee who is also an executor cannot be removed from his office of trustee against his own will unless it can be proved that all the duties of his executorship have been concluded, and that he is under no liability whatever: *In re Moore*. (3) In *In re Willey* (4) it was proved that all the testamentary debts had been paid.

(1) [1894] 2 Ch. 297.
(2) 8 Hare, 101.
(3) 21 Ch. D. 778.
(4) W. N. (1890) 1.

Here Mr. Payne has been party to what may have been a devastavit. The 12,000*l.* per annum was by the will made part of the personal estate. Annuities to the amount of 4000*l.* per annum have been secured by personal covenant. The personal estate was insufficient to pay in full the debts including the annuities, and the executors had to raise 100,000*l.* Payne, therefore, has not fully administered, and may be under serious liabilities against which he had a right to indemnify himself out of his testator's estate. It is of the utmost importance that a retiring trustee shall be fully and properly indemnified; and if a new trustee is appointed in his place Mr. Payne will be deprived of his only effectual indemnity. [He also referred to *Eaton* v. *Daines*. (1)]

STIRLING J., after stating the facts of the case to the effect above set forth, continued:—Without attributing any blame either to the Countess or to the gentleman who advised her, I think it is a matter of regret that the execution of the appointment, if it was to be made, was not postponed until some intimation of the views of the trustees had been obtained. However, the deed has been executed, and I have to decide whether the appointment is or is not valid.

Now, the first question which arises is one of fact. The power only comes into operation in case (inter alia) one of the three trustees should "be abroad," and I think the statement contained in the 7th paragraph of Mr. Payne's own affidavit enables me to decide without difficulty whether or not Mr. Payne was "abroad" within the meaning of the power at the date of the appointment. [His Lordship then referred to this statement, and continued:—]

Upon that state of facts it seems to me plain that on August 28, 1895, Mr. Payne was "abroad" within the meaning of the power to appoint new trustees. He had been abroad at all events from the time in the year 1893 when he went to reside at his present residence, and he does not intend to return before the expiration of the lease. All that he can say is, not that he positively will return then, but that he will probably do

(1) W. N. (1894) 32.

STIRLING J. so in consequence of the altered state of his wife's health; and the result of that is that for three years more he will in all probability be residing abroad. It seems to me, therefore, that according to the ordinary use of language he would be described as being abroad on August 28 last. I do not desire to depart from anything that was laid down by Lord Romilly in *In re Moravian Society*. (1) Questions of difficulty may no doubt arise as to when a trustee may be said to be abroad. In each case it must be a question of fact; and in this case I come to the conclusion that Mr. Payne was abroad at the date when the appointment was made.

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It is truly observed that this residence abroad is not necessarily a disqualification for office, and I have been invited to read the clause containing the power to appoint new trustees in this way: "I declare my will to be that in case the said trustees or any of them shall die or be abroad in such a way as to interfere with the discharge of the duties of the office of trustee." Those last words are not there. The power arises if the trustee "be abroad." If a trustee is abroad, then, as is laid down by Wigram V.-C. in *O'Reilly* v. *Alderson* (2), he puts himself in a position in which a cestui que trust may call upon the donee of the power to appoint new trustees to exercise it.

Now, none of the remaindermen have called upon the Countess, who is the donee of the power in the present case, to perform this duty; but I apprehend that it remains still a question for her to consider whether the circumstances of the case are such as to justify her in proceeding to an appointment of new trustees. If the appointment appeared to be without good ground or merely capricious, and not made bonâ fide, it is possible that the Court might see its way to interfere; but, upon the evidence before me, I do not see that any such case arises upon the present occasion. It is plain from what is stated in these affidavits that the discharge by Mr. Payne of his duties while he is resident abroad creates a certain amount of inconvenience and also of expense. The Countess is herself tenant for life under the will, and she is the donee of the power, and though none of the cestuis que trust have requested

(1) 26 Beav. 101. (2) 8 Hare, 101.

her to do so, it appears to me that it is quite within her competence to consider all the circumstances of the case; and if she does so, and bonâ fide comes to the conclusion that it is in the interest of every one that a new trustee should be appointed in place of the trustee who is abroad, then the Court has no right to interfere. It seems to me there are in this case proved facts which justify the conclusion at which the Countess arrived, namely, that it was desirable to appoint a new trustee in the place of Mr. Payne.

But then it is said that Mr. Payne is an executor and legal personal representative, and that the power of appointing new trustees ought not to be exercised so long as there are debts remaining unpaid. Whatever might happen if there still remained unadministered personal estate applicable to the payment of debts, it seems to me on the present occasion that objection cannot prevail. As I have said, all the general personal estate has been exhausted, certain legacies have been paid, and certain specific legacies have been assented to. But that could only have been done by the executors on the footing that they had discharged themselves of their duties as executors, and were willing to convert themselves into the position of trustees. Apart from that, there is nothing at the present moment existing which is vested in Mr. Payne virtute officii. He remains trustee of the estates during the life of the Countess, and he has also the term of 1000 years vested in him; but those estates and that term are vested in Mr. Payne, not in his capacity of executor, but as trustee under the will. That appears to me to be quite clear when one looks at the trusts upon which those estates and that term are held; for they enable the trustees to pay the sum of 12,000*l.* and the income received during the term, not in the order in which they would have been applicable by the executors, if they were part of the personal estate, but in the mode in which the trustees in their discretion consider that the funds so coming into their hands ought to be applied.

I now come to what has throughout seemed to me the matter deserving the most serious consideration, i.e., the fact that the Countess has chosen to appoint her own solicitor as

STIRLING J. trustee of this will. The trustees of the will are vested with a power of sale over the real estates; they will also be trustees for the purpose of the Settled Land Acts; and it is truly pointed out, that in certain cases the trustees in exercise of the powers conferred by those Acts may have to consider matters in which the interests of the tenant for life and remaindermen may conflict, and in which they will be bound to hold an even hand between all parties. And it is said that Sir Thomas Wright, the new trustee, who has to advise the Countess in the capacity of tenant for life, will be unable to discharge that duty efficiently when he comes to deal with the same matters as to which he has advised the Countess, in his capacity as trustee. I feel greatly the force of that objection. It is one which prevents the Court, when it is called upon to appoint a new trustee, from appointing a gentleman in such a position as Sir Thomas Wright now occupies. It also prevents the Court from sanctioning such an appointment.

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The rule is laid down by the Court of Appeal in *In re Kemp's Settled Estates* (1), a case which arose upon an application for the appointment of trustees for the purpose of the Settled Land Act, 1882, under s. 38 of that Act. Cotton L.J. said this (2): "The gentleman is no doubt a fit person to be a trustee, and the only objection to him is that he acts as solicitor for the tenant for life. Now the appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life. I have no doubt that Mr. Wood, as solicitor of the tenant for life, would advise him to the best of his ability, and recommend him to exercise his powers with a proper regard to the interests of the remaindermen. But solicitors, like judges, are fallible, and how could Mr. Wood, as one of the trustees, exercise a proper judgment on their behalf upon questions on which he had advised the tenant for life? It would be Mr. Wood as trustee putting a check upon Mr. Wood as solicitor to the tenant for life, and he would be placed in a false position."

(1) 24 Ch. D. 485. (2) 24 Ch. D. 487.

Now that case lays down a rule of practice for the guidance of the Court, and it would not be right for me to depart from it, even if I had any wish to do so; but I desire to say that I approve of the rule, and think it is a most proper rule, and one which ought to be observed. The question, however, arises, is it a rule which is binding upon the Court under all circumstances, or can the Court, if it sees fit, depart from it? I have myself departed from it in one case: *In re Marquis of Ailesbury* (1); but I think, and say most emphatically, that the Court ought to be very slow to depart from it—that before it departs from it the Court ought to see, not only that no disadvantage is likely to occur from the appointment, but that advantages are to be gained by reason of the appointment. I thought that those conditions were satisfied in the case I refer to; but I am bound to say that if I had the present appointment to consider I am not so satisfied, and if this were an application before me either under s. 38 of the Settled Land Act, or under the general jurisdiction of the Court to appoint Sir Thomas Wright to be trustee or to sanction his appointment, I should consider myself precluded from giving that sanction by the rule of practice, which I think is based on very sound reasons.

But this is not a case in which the sanction of the Court is asked in any way, and, as is pointed out by Cotton L.J. himself in *In re Kemp's Settled Estates* (2), the question whether an appointment of this kind, when already made by the donee of the power, is or is not valid, is a very different one from the question whether the Court itself would see fit in the first instance either to make it or sanction it. In *In re Kemp's Settled Estates* (2) the case of *Forster* v. *Abraham* (3) was referred to. In that case it was held by Sir G. Jessel M.R. that there was nothing to prevent the tenant for life being appointed trustee of a settlement, although the Court would not itself readily sanction such appointment. And Cotton L.J., when that case was cited in *In re Kemp's Settled Estates* (2), makes this observation (4): "That case only decides that the appointment

(1) [1893] 2 Ch. 345, 360.
(2) 24 Ch. D. 485.
(3) L. R. 17 Eq. 351.
(4) 24 Ch. D. 487.

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of a tenant for life under a power was not invalid, it does not decide that the Court would have appointed him." Again, in the case of *In re Norris* (1), where on the retirement of one of two trustees the continuing trustee, who was the solicitor to the trustees, had appointed his son, who was partner with him in his business, to be a new trustee of a will, the trusts of which were being administered by the Court, Pearson J. refused to sanction the appointment, but added this observation (2): "I am very far from saying, and I must not be understood to say, that, if there was a trust which was not being administered by the Court, and the person who had the power of appointing new trustees had bonâ fide appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the court would be invalid. If such a case came before me, and I found that the appointment had been made bonâ fide outside the court, I should certainly hold that the trustees were validly appointed."

The question, then, which I have to ask myself is, Does the existence of this rule of practice, however binding it may be, prevent the donee of a power from appointing her own solicitor to be a trustee? And in my judgment, although I should not have made the appointment or sanctioned it, it does not preclude the tenant for life from so doing. As far as the individual selected is concerned, there can be no question that he is a person who is excellently fitted to be trustee. He has had large experience, he is acquainted with the estates, and I have got this, which weighs very much with me, that although all the beneficiaries now in existence are before the Court, not one of them has said a word in opposition to the appointment. They appear before me and say they desire to occupy a neutral position—that they would have been perfectly content if Mr. Payne had continued to be trustee, but that they are equally satisfied with Sir Thomas Wright, and they take no part in any way, but leave the whole matter in the hands of the Court.

(1) 27 Ch. D. 333. (2) 27 Ch. D. 341.

Now, under those circumstances, I do not think that I can say that this appointment is otherwise than valid.

It has lastly been suggested that by reason of this appointment Mr. Payne, who undoubtedly remains still the legal personal representative of the testator, may be under some liability in respect of which he is entitled to an indemnity out of the real estate of the testator, which is the only property now in existence applicable for the payment and satisfaction of any remaining debts and liabilities. I conceive that nothing that is done on this occasion can prejudice that right to an indemnity if it exists. I am not satisfied that there is anything more than mere nominal liability; but certainly it is of the greatest importance to preserve to trustees their right to indemnity out of the trust funds. If the Court were called upon to make a vesting order, or to require the continuing trustees to do any act which would have the effect of taking out of Mr. Payne any estate which is vested in him, I should take care that he was not deprived of the trust estate without ample indemnity being provided; but the whole of the property remaining subject to the trust is real estate, and by the operation of the appointment which has been executed by the Countess, and the Conveyancing Act, the legal estate has already become vested in the new trustees. But, however that may be, no right of Mr. Payne as a legal personal representative ought to be prejudiced, and in case it should turn out that there is anything which requires a more specific indemnity than Mr. Payne has yet got, I shall reserve him liberty to apply, in order that full effect may be given to that right.

Solicitors: *Bower, Cotton & Bower; Smith, Fawdon & Low, for Sir T. Wright, Leicester; Evans, Foster & Wadham; Iliffe, Henley & Sweet, for Laycock, Dyson & Laycock, Huddersfield; Gamlen & Burdett.*

W. W. K.

STIRLING J.

In re POCOCK AND PRANKERD'S CONTRACT.

1895
Dec. 12, 19, 21.

Vendor and Purchaser—Title—Settled Lands—Limitation of various Interests to same Person by way of Succession—Tenant for Life—Person entitled to Income—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 58, *sub-ss.* 1 (*ix.*), 2.

Real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation, and after her death to such uses as she should by will appoint, and in default to the use of herself in fee; and she contracted to sell the property to a purchaser. The Court was not satisfied that these limitations created a "settlement" within s. 2 of the Settled Land Act, 1882, but

Held, that the married woman had the powers of a tenant for life within s. 58, sub-s. 1 (ix.), of the same Act, and could make a title as such to the purchaser.

VENDOR AND PURCHASER SUMMONS.

Charles Boucher, who died on December 23, 1865, by his will, dated in January of that year, devised real estate in Wisbech, in the county of Cambridge, to the use of trustees, their heirs and assigns, during the life of his daughter Mary Ann Collins, in trust for her for her separate use without power of anticipation, and after her decease to the use of any one or more of her children in such manner as she should by deed or will appoint; and in default of appointment to certain uses, and with a gift over therein mentioned.

Mary Ann Collins had two children only—namely, Mary, who married S. J. Pocock in October, 1867; and Elizabeth, who married A. A. Prankerd in September, 1874.

Mary Ann Collins, by her will, dated June 1, 1881, in exercise of the power in the testator's will contained, appointed that the said real estate at Wisbech should after her death remain, and that the trustees of the testator's will should stand possessed thereof, as to one moiety, upon trust to pay the rents and profits thereof to Mary, the wife of S. J. Pocock, for her life for her separate use without power of anticipation, and after her death to the use of such person or persons for such interests and in such manner as she should by will appoint; and in default of such appointment, to the use of the said Mary

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Pocock, her heirs and assigns, for ever: and as to the other moiety, upon and to precisely similar trusts and uses in favour of Elizabeth, the wife of A. A. Prankerd, and her appointees, and in default of appointment to the use of the said Elizabeth Prankerd in fee.

Mary Ann Collins died in January, 1894; and in October, 1894, Mrs. Pocock and Mrs. Prankerd contracted, as tenants for life respectively of equal moieties, to sell the real estate at Wisbech to the governors of the Wisbech Grammar School.

Upon investigation of the vendors' title, the purchasers took the objection that it was doubtful whether the appointment by Mrs. Mary Ann Collins constituted a settlement within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 1.

This summons was taken out under the Vendor and Purchaser Act, 1874, by the vendors, in order to have the validity of this objection determined by the Court.

Ingle Joyce, for the vendors. These two wills are instruments by virtue of which this land stands limited to or in trust for certain persons by way of succession, and thus constitute a "settlement" within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 1. Although for the purpose of considering whether the appointment by Mrs. Collins in favour of her two children was a valid exercise of her power, an appointment in the form contained in her will is, no doubt, equivalent to an appointment of an absolute interest, *Slark* v. *Dakyns* (1); still it creates a succession; and the persons entitled by way of succession are, as to each moiety, the wife herself as tenant for life, her appointees if any in remainder, and the husband and wife in right of the wife in ultimate remainder in fee in default of appointment: *Polyblank* v. *Hawkins*. (2) Mrs. Pocock and Mrs. Prankerd can accordingly sell as tenants for life of their respective moieties under the powers of the Settled Land Acts. If not, the land cannot be sold, as they are both restrained from anticipation.

E. M. Jackson, for the purchaser. In this case there is no settlement within the meaning of the Settled Land Acts.

(1) L. R. 10 Ch. 35.

(2) 1 Doug. 329; 1 Wms. Saund. p. 343, as note 4 to *Took* v. *Glascock*.

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The limitations are in favour of one person only. They are limitations of various estates and interests; but they are not to "persons by way of succession." They all take effect at once in favour of the same person, and the restraint on anticipation is only a restraint on the mode of enjoyment: *Bates* v. *Kesterton*. (1)

Joyce, in reply.

Cur. adv. vult.

1895. Dec. 19. STIRLING J. I wish to mention this case. I have considered it; but I have not been able to satisfy myself that the will constitutes a settlement within the meaning of s. 2, sub-s. 1, of the Settled Land Act, 1882; and I wish to call the attention of the parties to a later section of that Act, namely, s. 58. Sub-s. 1 of that section runs thus: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Then follow nine clauses enumerating the persons who are to have these powers, and the 9th of those clauses is this: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." It seems to me that the present case falls literally within those provisions; but I should like to hear what is to be said on that point, and I will direct the case to stand over till Saturday next, so that there may be an opportunity of considering it.

1895. Dec. 21. *E. M. Jackson*, for the purchasers. Sect. 58 does not dispense with the necessity for a settlement according to the definition in s. 2, sub-s. 1. Sub-s. 2 of s. 58 means that that definition must be complied with. Clause (ix.) of sub-s. 1 was only intended to get rid of the doubt suggested by *Taylor* v. *Taylor*. (2)

Secondly, if a settlement within s. 2, sub-s. 1, is not neces-

(1) W. N. (1895) 153; since reported, ante, p. 159.

(2) L. R. 20 Eq. 297, 304; 3 Ch. D. 145, 147.

sary, still s. 58 is confined to cases of limited ownership. A person entitled for life with remainder in fee simple is not a limited owner. The restraint on anticipation does not by itself bring the case within the Act.

STIRLING J. I am much obliged to Mr. Jackson for the argument he has offered on this point; but I confess I do not see any reason why this case does not fall within the provisions of s. 58 of the Settled Land Act of 1882.

Now, the short facts are these. Under a will made in the exercise of a limited power of appointment, the real estate now stands limited (as to each moiety) unto and to the use of trustees during the life of a married woman upon trust to pay the rents and profits to her for her separate use without power of anticipation, with remainder to such uses as she may by will appoint, and in default of appointment to the use of herself in fee. The legal estate, therefore, is in the trustees during the life of the married woman. The equitable interest is in the married woman during her life fettered by the restraint on anticipation; subject to that she takes a legal estate in fee liable to be defeated by the exercise of the power of appointment.

Now, it was contended that this will constituted a settlement within the meaning of s. 2, sub-s. 1, as being an instrument under or by virtue of which the land "stands for the time being limited to or in trust for any persons by way of succession." I have a difficulty in adopting that view, because the will seems to me hardly to fall within the words of the section. It is no doubt an instrument by which the land stands limited to, or in trust for, one and the same person for various estates and interests by way of succession. But what the section deals with is an instrument under which land "stands for the time being limited to, or in trust for, any persons"—being more than one—"by way of succession." Looking further into the Act, however, I find that s. 58, in sub-s. 1, provides this: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Then clause (ix.) includes amongst those persons,

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"A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." Therefore a person entitled to the income of land under a trust or direction for payment to him during his own life is plainly within that class. And here the trust is to pay the rents and profits to the lady for her life. She is exactly such a person as is there designated. But then, no doubt, one has to consider whether this is a "settlement." Sub-s. 2 of s. 58 provides: "In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised."

Now, it seems to me plain that that was meant to extend the definition of a "settlement" to cases not included under s. 2 of the Act. And it is very well illustrated by the clause immediately preceding clause (ix.), namely, that specifying a tenant by the curtesy. If either by conveyance or otherwise a married woman was entitled absolutely in fee to an estate, upon her death leaving her husband surviving, it is the obvious intention that the husband if tenant by the curtesy should be treated as a tenant for life, and have the powers of a tenant for life. But unfortunately the words of sub-s. 2 were not apt to that case, because the right of the husband was not derived under an instrument, but under the general law. Again the words of s. 2 were not wide enough to include that case, because they only extended the definition of a settlement to the instrument under which the estate or interest arose; and as the estate or interest of the husband did not arise under an instrument, but by virtue of the law, there was a difficulty in applying it to that case.

But that was set right by the Act of 1884, which said (1) that for the purposes of the Act of 1882 the estate of a tenant by the curtesy should be deemed an estate arising under a settlement

(1) 47 & 48 Vict. c. 18, s. 8.

made by the wife. That seems to me to prove, if there were any doubt about it before, that the meaning of the Act was to embrace, under sub-s. 2 of s. 58, instruments that did not fall within the definition of "settlement" in the earlier part of the Act. There is nothing said in clause ix. of sub-s. 1 as regards the remainder after the determination of the trust referred to. As it seems to me, the present case falls within the exact language of s. 58, and this is an Act which ought certainly not to receive a narrow construction. I think a title may be made by the married woman by virtue of the powers conferred by that section. There will be a declaration that the objection of the purchaser to the title of the vendors, on the ground that they have not power to sell under the Settled Land Act, 1882, is not a valid objection; but as the point was a fair point to bring before the Court, I shall make no order as to costs.

Solicitors: *Peake, Bird, Collins & Peake; Wing & DuCane, for Edward McD. Jackson, Wisbech.*

W. W. K.

KEKEWICH J.

1895

Nov. 12.

EDWARDS *v.* JENKINS.

[1893 E. 1168.]

Custom—Validity—Recreation—Custom laid in Inhabitants of more Parishes than one.

A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad.

THE plaintiff in this action sued as the person in possession of a piece of land at Beddington, in the county of Surrey, alleging that the defendants, who were four inhabitants of the parish of Beddington, on August 24, 1893, broke and entered or trespassed on the land and did great damage by throwing down the fence enclosing the same, and that the defendants asserted a right to do the acts complained of and threatened to repeat them. The plaintiff claimed 500*l.* damages, and an injunction to restrain the defendants from repeating the trespass complained of.

By their amended statement of defence the defendants denied that the plaintiff was in possession of the piece of land, and further alleged as follows: "The said piece of land has from time immemorial until the month of August, 1893, been an open piece of common land, and there has been, and is now, an ancient custom and approved in the said parish of Beddington, that all the inhabitants for the time being of the said parish, and of the adjoining or contiguous parishes of Carshalton and Mitcham, have during the time aforesaid used and of right have had and still have the right and privilege of recreation and of exercising and playing all lawful games, sports and pastimes upon the said piece of land every year, and all seasonable times of the year, at their own free will and pleasure, and that for the purposes aforesaid the said inhabitants should have free access to the said piece of land."

The defendants further alleged, by way of counter-claim, that the plaintiff had removed gravel and earth from the piece of

land so as to prevent its being used for the purposes of the said ancient custom, and, on behalf of themselves and all others the inhabitants of the said parishes, the defendants claimed against the plaintiff an injunction to restrain him, his servants, agents, and workpeople, from erecting any fence or other obstructions which should or might interfere with the defendants and others such inhabitants as aforesaid in exercising their said right and privilege.

The action came on for trial on February 21, 1895, when the defendants appeared in person. On behalf of the plaintiff evidence was given proving his right to the possession of the land, and the commission of acts of trespass by the defendants. His Lordship held that the plaintiff had established his right to maintain the action, and called upon the defendants to argue the point of legal right. The defendants at that time claimed by their defence the right of recreation as a prescriptive right, but the evidence adduced by them went to shew the existence of a custom. The evidence of user was of the most general character, both as regards the persons using and the acts done, but it clearly appeared that such user as could be shewn extended to inhabitants of all the three parishes. His Lordship, in order to give the defendants an opportunity of instructing counsel and properly presenting their case, adjourned the hearing with liberty to the defendants to amend their pleading.

The pleading having been amended, the action now again came on for hearing.

Warmington, Q.C., and *W. Clode*, for the plaintiff. This defence is bad. A custom for the inhabitants of several parishes to exercise the right of recreation on land situate in one of such parishes is too wide, and cannot be supported in law. Such a custom can only be valid if laid in the inhabitants of the manor, parish, or other place in which the land is situate. In Co. Litt. 113 B, it is said that "a custome, which is local, is alledged in no person, but layd within some mannor or other place." In *Gateward's Case* (1) it was held that a custom of the town of Stixwold that every inhabitant thereof should have common within

(1) 6 Rep. 59 b.

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EDWARDS v. JENKINS.

another town was bad. The custom alleged here is worse than that. In the anonymous case (1) referred to in *Gateward's Case* (2) a prescription by a copyholder that all customary tenants ejusdem tenementi, instead of ejusdem manerii, had common of estovers in another manor was holden bad. In *Hammerton* v. *Honey* (3) Sir George Jessel M.R., in reference to a case where a custom to use a green as a place of recreation and amusement was claimed, said: "What must be the usage proved? It must not only be consistent with the custom alleged, but, if I may use the expression, not too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."

[They referred also to a case of *Cox* v. *Shoolbred* (4), before Sir George Jessel M.R., relating to the parish of Pangbourne, and in which the evidence was held to go beyond the custom claimed.]

C. Johnston Edwards, and *W. P. Baildon*, for the defendants. It is clear that a custom for the inhabitants of a parish to enter upon land in the parish and enjoy recreation thereon at any times in the year is good in law: *Hall* v. *Nottingham* (5); *Fitch* v. *Rawling*. (6) There is no reason why such a custom should be confined to the inhabitants of a single parish. The words in Co. Litt. 113 B, are "mannor" or "place," and in *Bourke* v. *Davis* (7) Kay J. says that a claim for a right of recreation "is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district." So in *Earl of Coventry* v. *Wilkes* (8), Cockburn C.J. speaks of a customary right of this kind as being "applicable to certain inhabitants of the district where the custom is alleged to exist." Several

(1) Dyer, 363 b, pl. 27 (21 Eliz.).
(2) 6 Rep. 59 b.
(3) 24 W. R. 603, 604.
(4) Reported only in *The Times* of November 15, 1878.
(5) 1 Ex. D. 1.
(6) 2 H. Bl. 393.
(7) 44 Ch. D. 110, 120.
(8) 9 L. T. (N.S.) 384.

contiguous or adjoining parishes may, it is submitted, together constitute a district or place in the inhabitants whereof such a custom as this may properly be laid. In *Hammerton* v. *Honey* (1) the reason why the plaintiffs failed was because their evidence did not establish the custom which they alleged, but one of a much wider character and wholly unknown to the law. So also in *Cox* v. *Shoolbred*. (2)

It is submitted that the custom pleaded in this case is good in law, and that the defendants ought to be allowed to adduce evidence in support of it. But admittedly the custom if confined to the inhabitants of Beddington would be good; and the defendants ask for leave to amend by striking out the reference to the parishes of Carshalton and Mitcham.

[They referred also to *Mounsey* v. *Ismay*. (3)]

KEKEWICH J. [His Lordship, after referring to the statement of defence as above set out, continued:—] No argument has been addressed to me on the question whether the right alleged is in itself good. I assume that it is good in law, provided it is laid in the proper persons. The only question, therefore, is whether it is properly laid in "all the inhabitants for the time being of the said parish, and of the adjoining or contiguous parishes of Carshalton and Mitcham." It seems to me that though there is no authority exactly deciding that such an allegation is bad, all the cases so directly point that way that I ought to consider the point concluded by authority. I understand that the defendants have taken for their guide the case of *Fitch* v. *Rawling* (4), which is not the earliest authority on the subject, but is now just one hundred years old, and is quoted in all the text-books and generally referred to on this subject. There the allegation was as regards all the inhabitants for the time being of the parish. The Court were unanimously of opinion that "an ancient and laudable custom use and approved of in the said parish, that is to say, that all the inhabitants for the time being of the parish aforesaid, have during all the time aforesaid, used

(1) 24 W. R. 603.
(2) Reported only in *The Times* of November 15, 1878.
(3) 1 H. & C. 729; 7 L. T. (N.S.) 717; 32 L. J. (Ex.) 94.
(4) 2 H. Bl. 393.

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1895

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and been accustomed to have, and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports, and pastimes, in and upon the said close every year, at all seasonable times of the year at their free will and pleasure," was good. But there was a second averment, namely, that the custom was "for all persons for the time being being in the said parish," and that the Court, with as much unanimity, but without so much exposition of the law, held to be clearly bad. Therefore, it is clear that a custom going beyond all the inhabitants of the parish may be bad. The question is how far you may go beyond that. Mr. Johnston Edwards' argument, founded mainly on the language of Kay J. in *Bourke* v. *Davis* (1), is, that the custom is good if confined to inhabitants of a particular district, and that "district" may be construed as meaning two or three contiguous or adjoining parishes, in addition to the parish in which the land is situate. I cannot find any justification for that contention. No doubt Kay J. does use the word "district," and it is used by Cockburn C.J. in *Earl of Coventry* v. *Wilkes* (2), where he says: "The claims set up are much too general, for there can be no customary right for all the Queen's subjects to be present and to go and remain upon the land"; but then he limits it in this way: "a customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist, and cannot be claimed in respect of the public at large. For this there is the authority of *Fitch* v. *Rawling* (3), which is binding upon us." The only way in which that can be used in favour of the defendants is by saying that all the parishes are situate within a certain "district." That expression might include all the parishes in a county or a hundred; it is difficult to know how to define a district; but the real question is how such a right as is here claimed could have a legal origin, and I fail to see how a legal origin can be attributed to a "habit"—I use that word for the moment instead of "custom"—of the inhabitants of many parishes to come and play cricket or any other game on a particular piece of land. Heath J., in the

(1) 44 Ch. D. 110.

(2) 9 L. T. (N.S.) 384.

(3) 2 H. Bl. 393.

case of *Fitch* v. *Rawling* (1), seems to indicate what in his opinion must be the foundation of the custom. He says (2): "the lord might have granted such a privilege, as is claimed by the first custom, before the time of memory. As to the second, it is clearly bad, being for all mankind." I do not, therefore, find in any of the cases anything that would justify me in saying that the use of the word "district" means more than the particular division known to the law in which the particular property is situate. It may be situate in a parish, or in a manor, or there might be some other division. But I cannot see how a number of parishes can, without specific evidence, be said to be situated in a particular district so that land in one of the parishes is land in a particular district. I take it that the judges have used the word "district" as meaning some division of the county defined by and known to the law, as a parish is; and that I should be extending their meaning if I were to say that a custom of this kind could be claimed as regards several parishes.

Mr. Edwards is right, I think, in his criticism of the other cases cited by Mr. Warmington. I think they do go to this, that where a custom is asserted as regards the inhabitants of a particular parish, then, if the evidence goes to shew that the privilege has been exercised by the inhabitants of other parishes, the proof is inconsistent with the allegation, and the case fails on that ground. But it is to be observed that in all such cases, if the larger custom could have been set up, a custom, that is, for inhabitants of adjoining parishes, then leave to amend ought to have been applied for, and if applied for, would, I should say, have been granted, so as to admit of the larger custom being proved. It seems to follow that the reason why those cases failed was because the evidence was inconsistent with the allegation, and no allegation could be introduced by amendment so as to be sustainable in law. That brings me to the last point. Mr. Edwards has asked for leave to amend. I am extremely unwilling to refuse leave to amend in any case, especially in one in which the defendants have not until lately had the advantage of legal advice. But the rights of other

(1) 2 H. Bl. 393. (2) 2 H. Bl. 399.

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parties beside the defendants have to be considered. The plaintiff has been fighting this case for a considerable time, and the defendants have had great indulgence shewn to them, and I am bound to consider whether there is any reasonable chance of justice being defeated by my refusing leave to amend. I do not think that there is. The defendants' pleading has already been amended, and I must take it that counsel amended it after consideration, and possessing himself, as well as he could, of all the facts. He now asks for an amendment by striking out the words referring to Carshalton and Mitcham, so as to claim a custom for Beddington only. It is clear to my mind that if the amendment were made the evidence adduced would shew that the custom affects not only the parish of Beddington, but the other parishes, and I should be in precisely the same position as the Master of the Rolls was in the case of *Cox* v. *Shoolbred* (1), and should have to decide against the defendants, because they had proved a custom larger than they claimed. Under these circumstances I think I ought not to grant leave to amend. The result is that there must be judgment for the plaintiff.

Solicitors: *Crouch, Edwards & Heron; J. D. B. Lewis.*

(1) *The Times*, November 15, 1878.

C. C. M. D.

In re WHEELER AND DE ROCHOW.

KEKEWICH J.

1895

Nov. 28.

[1895 W. 1824.]

Trustee—Power to appoint New Trustees—Person to exercise Power—Event not specified in Trust Instrument—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 10.

In s. 10 of the Trustee Act, 1893, the words "person or persons nominated for the purpose of appointing new trustees by the instrument creating the trust," refer to the person or persons nominated for the purpose of appointing new trustees in the particular event which has happened.

Where, therefore, by a marriage settlement the husband and wife, or the survivor of them, were empowered to appoint new trustees in certain specified events, including the event of a trustee becoming incapable, but not the event of a trustee becoming unfit, and one of the trustees became unfit but not incapable:—

Held, that the appointment of a new trustee ought to be made not by the surviving husband as the person nominated in the settlement, but by the continuing trustees under the provisions of the Act.

ADJOURNED SUMMONSES.

By a settlement dated March 16, 1864, made in contemplation of the marriage of Mr. A. E. De Rochow with Mrs. E. S. Wheeler (afterwards De Rochow), certain funds were vested in L. M. Wynne, Alfred Dixon, and A. L. Wheeler upon usual trusts, and the settlement contained the following clause: "Provided also and it is hereby further agreed and declared that in case the trustees hereby constituted, or any of them, or any trustee or trustees to be appointed under this present provision or by the Court of Chancery, or by any other competent authority, shall die, desire to be discharged from, or refuse, decline, or become incapable to act in the execution of the trusts or powers herein contained, then, and so often as the same shall happen, it shall be lawful for the said A. E. De Rochow and E. S. Wheeler or the survivor of them . . . . by any deed or deeds, to appoint any other person or persons to supply the place of the trustee or trustees respectively so dying, desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid."

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There was no issue of the marriage, and Mrs. E. S. De Rochow died in 1892.

On March 9, 1895, L. M. Wynne was adjudicated a bankrupt. He had previously absconded, and it was not known where he was.

By a deed dated July 13, 1895, A. E. De Rochow purported, in exercise of the powers conferred upon him by the settlement and by virtue of the provisions of the Trustee Act, 1893, to appoint J. T. B. Sewell to be trustee in the place of L. M. Wynne, and to act conjointly with the two other trustees for all the purposes of the settlement.

Two summonses were taken out in the matter of the settlement: one by A. E. De Rochow and J. T. B. Sewell, asking that under s. 35 of the Trustee Act, 1893, the right to call for a transfer of, and to transfer the stocks and funds subject to the trusts of the settlement and then standing in the names of L. M. Wynne, Alfred Dixon, and A. L. Wheeler, and to receive any dividends due, or to accrue due thereon, might vest in Alfred Dixon, A. L. Wheeler, and J. T. B. Sewell. The other was a summons by beneficiaries entitled under the settlement subject to De Rochow's life interest for an order under s. 25, sub-s. 1, and s. 35, sub-s. 1, of the Trustee Act, 1893, appointing Major-General H. C. Magenis trustee in the place of L. M. Wynne, and for an order vesting the trust funds accordingly.

The two summonses were adjourned into court, and now came on together for hearing.

Bramwell Davis, Q.C., and *Maugham*, for A. E. De Rochow and J. T. B. Sewell, in support of the first-mentioned summons. In the event which has occurred, namely of L. M. Wynne being unfit to act, the appointment of new trustees was properly made by De Rochow as being the person nominated for the purpose of appointing new trustees by the instrument creating the trust within the meaning of s. 10 of the Trustee Act, 1893. (1) The

(1) Sect. 10 of the Trustee Act, 1893, is, so far as is material, as follows: "(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or

enactment is a remedial one, and the effect of it, according to the plain construction of the words used, is that if there is a person nominated by the trust instrument for the purpose of appointing new trustees, that person is to have the power of appointing not only in the particular cases specified in the trust instrument, but also in the cases mentioned in the Act. *Cecil* v. *Langdon* (1) is not in point, because there the only question was whether the limitation imposed by the settlement on the exercise of the power was also imposed on the exercise of the power conferred by s. 31 of the Conveyancing Act, 1881; and it was held that the intention to fetter the power under the settlement in the events there specified could not be treated as an expression of a contrary intention within the meaning of s. 31, sub-s. 7, so as to affect the application of the statutory power. In the same way, in the present case, the omission to mention the particular event which has happened, namely, that of a trustee becoming unfit, cannot be regarded as the expression of a contrary intention within s. 10, sub-s. 5, of the Act of 1893. *In re Coates to Parsons* (2), so far as it touches the present case, is a decision of North J. to the same effect.

Further, it is to be observed that there is a remarkable difference between the wording of s. 31 of the Act of 1881 and s. 10 of the Act of 1893, and it is submitted that the alteration of the language was intended to meet this very point. In the Act of 1881 the words were "the person or persons nominated

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any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid. . . ."

"(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained."

(1) 28 Ch. D. 1.

(2) 34 Ch. D. 370.

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for this purpose by the instrument," &c., and the doubt, as suggested in Lewin on Trusts (9th ed. p. 732), arose whether "where the settlement has given the power of appointing new trustees in certain special events to A., he is by the Act empowered to appoint new trustees in any other event not mentioned in the settlement, but falling within s. 31." In *In re Walker and Hughes' Contract* (1) North J. seems to have decided that the person nominated by the trust instrument was the person to make the appointment, even though the special power did not provide for an occasion which had arisen, and which was within the Act of 1881. In s. 10 of the Act of 1893 the words, in order to remove all doubt, are altered to "person or persons nominated for the purpose of appointing new trustees," shewing clearly the intention of the Legislature that the trust instrument alone should be referred to in order to ascertain who are the persons to make the appointment.

Warrington, Q.C., and *Borthwick*, for the beneficiaries, in support of the second summons. This case is practically concluded by the decision in *Cecil* v. *Langdon*. (2) No doubt the main question in that case was whether the fetter imposed by the settlement was also imposed on the statutory power; but in order to decide that it was necessary to decide the very question which arises here, whether the persons to appoint were the persons nominated by the settlement or the persons mentioned in the Act, and it was held that the power in the settlement being inapplicable to the case which had arisen, the right persons were those mentioned in the Act. It is to be observed that by sub-s. 5 of s. 10 it is provided that the Act shall have effect "subject to the terms of the instrument and to any provisions therein contained." The argument against us amounts to this—that if there is a person nominated by the instrument to appoint new trustees in a very limited number of events, he is to have the general power of appointment under the Act, and that whatever restrictions the settlor has imposed on the person nominated to appoint for certain purposes, that person for all other purposes is to have an unrestricted power. If a settlor has conferred a power to appoint strictly limited to the event of

(1) 24 Ch. D. 698, 702. (2) 28 Ch. D. 1.

a trustee dying, is it to be said that that person is to have a power to appoint in any other event? In the present case the word "unfit" may have been designedly omitted; it may have been thought that in the case of unfitness it was desirable that resort should be had to the Court. The construction contended for might in many cases defeat the intention of the settlor, and therefore not give effect to the Act "subject to the terms of the instrument." The alteration made in the wording of s. 10 of the Act of 1893 was merely for the purpose of greater accuracy of language. The expression "for that purpose" in the Act of 1881, where "purposes" had not in terms been previously mentioned, was not an accurate use of language.

Bramwell Davis, Q.C., in reply.

KEKEWICH J. The provision for the appointment of new trustees which is now to be found in s. 10 of the Trustee Act, 1893, very nearly repeating the language of previous Acts, is remedial, devised for the purpose of avoiding the expense of resort to the Court; and the Court, therefore, in construing that provision, is justified in adopting a construction which will give a large effect to it. But the language ought not to be strained, and although the Court may be apprehensive, as it appears Lindley L.J. was in the case of *Cecil* v. *Langdon* (1), of giving too narrow a construction, still it must keep within the language of the statute.

The words of the section which I have to construe are these: "then the person or persons nominated for the purpose of appointing new trustees by the instrument." Those words are not new. They are a slight variation from the words in the Conveyancing Act, 1881, s. 31, which, again, was a slight variation of the language used in 1860 in s. 27 of Lord Cranworth's Act (23 & 24 Vict. c. 145). The last-mentioned Act was, I believe, the first Act which contained any provision of this kind. Up to that time it had been the common form to provide in a power of appointing new trustees that the appointment should be made, in the case of a marriage settlement, by the husband and wife or the survivor, or in other cases by a tenant for life or tenants for

(1) 28 Ch. D. 1.

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life in succession. But up to that time it was never the practice to insert merely a provision that specified persons should have the power of appointing new trustees. Such a clause in the absence of a statutory provision, similar to that introduced by Lord Cranworth's Act, would have been meaningless, and it was necessary to indicate seriatim the various events in which the power was to be exercised. But after, and in consequence of Lord Cranworth's Act, it became the practice of conveyancers to insert, instead of the detailed power of appointing new trustees, a provision that the power of appointing new trustees should be vested in certain named persons; and I think I am entitled to suppose that account was taken in all subsequent legislation of that practice of conveyancers. Bearing that in mind, and observing the language of the 5th sub-section of s. 10 of the Act of 1893, I think that the intention of the Legislature clearly was to enlarge the powers possessed by testators and settlors by conferring a general power for the appointment of new trustees without resort to the Court in such a way as not to oust or destroy the special provisions of the particular instrument, but to be a substitute for such provisions if none existed, or an extension of them if they did not actually fit the events which had happened. The words in s. 10, "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust," I think, refer in the first place, to the persons who are nominated generally to appoint new trustees by such a form as I have above mentioned. That is plain enough; but then the Legislature cannot be taken to have contemplated only a case where there was a mere nomination of persons for the purpose of appointing new trustees, but must have contemplated other cases where there were persons with a power of appointing vested in them. The question, then, is whether the section means that, where the power to appoint new trustees in certain events is vested in certain persons, they are to be the persons to appoint new trustees in those particular events, or that they are to appoint new trustees in other events, which are specified in the section but not contemplated by the trust instrument. In support of the latter view

it is to be observed that the Act of Parliament is intended to be extensive, and that it may well be that the persons who by the trust instrument are empowered to appoint new trustees in the events therein specified are also to have the power in the events specified in the Act of Parliament. But before this view is adopted it is necessary to consider that everything is made subject to the provisions of the settlement, and that, even apart from sub-s. 5, it ought not to be hastily supposed that the Legislature intended to interfere with any contract which it does not render improper as being contrary to public policy or on any other ground. If the wider construction is adopted, there are many cases to which it would be difficult to apply this provision. It is not at all unusual to provide in a settlement that a power to appoint new trustees shall be vested as regards the husband's property in one person or persons, and as regards the wife's property in another person or persons. All are alike "persons nominated for the purpose of appointing new trustees." To which set of persons is the Act to apply? It seems clear that the persons nominated to appoint new trustees of the husband's property would be the persons to exercise the statutory power when occasion arises as to that fund, and the persons nominated to appoint new trustees of the wife's property would be the persons to exercise the statutory power when occasion arises as to that fund. In the first case, therefore, which occurs to the mind—a case by no means improbable—it is found that the Act does not mean that in all cases the persons nominated by the instrument are to appoint. Instances might easily be multiplied. The experience of conveyancers shews that testators often make strange provisions as to the appointment of new trustees. Sometimes there is property abroad, and there is a special power to appoint new trustees for the purpose of that property. So, again, it is not unusual for a testator to nominate trustees for the purpose of his business which is to be carried on after his death, and other trustees for the purposes of his own private estate. In all these cases the difficulty would occur. I can only conclude that the Act must in these cases be read as meaning "the person or persons nominated for the purpose of appointing new trustees ad hoc," that is, with

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reference to the particular property in question. That is a sensible limitation, and if it is adopted it seems to follow that the statutory power is not so extensive as is contended for, and refers to the persons who are nominated to appoint in the particular event, as well as with reference to the particular property. It is quite possible that a settlor might think that the husband or wife or a trustee might very well be trusted to appoint a new trustee in certain events, and yet was not competent, or the best person to exercise the power in certain other events, to the happening of which the Legislature has extended the statutory power of appointing new trustees. Those considerations lead me to the conclusion that, inasmuch as the event which has occurred, namely, the bankruptcy of Mr. Wynne (who whether or not he may be unfit by reason of his bankruptcy, is certainly unfit by reason of his having absconded), is not within the power contained in the settlement, the power conferred by the Legislature must be exercised by the person or persons nominated by the Legislature for that purpose, and not by the person or persons nominated by the instrument for the purpose of appointing new trustees in this case, who are not nominated ad hoc.

As to the authority of *Cecil* v. *Langdon* (1) which has been referred to, I follow Mr. Warrington's argument, and I think that the construction I have adopted is perfectly in harmony with that decision. But, on the other hand, I do not think this point was before the Lords Justices, or is concluded by their decision. Then in *In re Walker and Hughes' Contract* (2) I do not think that North J. was dealing with this point. He really only repeats in his own language the provision of the Act. Then there is only one other point. Mr. Maugham has called my attention to the difference between the language of s. 31 of the Conveyancing Act, 1881, and that of s. 10 of the Trustee Act, 1893, and there is no doubt that the change of language is worth attention: from "person or persons nominated for this purpose by the instrument, if any, creating the trust" the words are changed to "person or persons nominated for the purpose of appointing new trustees." I think Mr. Warrington's criticism

(1) 28 Ch. D. 1. (2) 24 Ch. D. 698.

on that is correct. Before that point in the sentence in the Act of 1881 no power of appointment of new trustees had been mentioned. There was a reference to trustees, and a reference to their retirement, but no reference to or mention of any appointment of new trustees, and therefore the phrase "nominated for that purpose" was a little crude. But the section of the Act of 1893 is framed more artistically. It is, I think, a mere amendment in drafting, which does not alter the meaning of the Act. The result is that the vesting order asked on the first summons cannot be made, as I can only make such an order on the appointment of new trustees. On the other summons there must be an order appointing new trustees accompanied by a vesting order.

Solicitors: *Dixon, Weld & Dixons; Blunt & Co.*

C. C. M. D.

In re CHAPMAN. COCKS *v.* CHAPMAN.

[1893 C. 1103.]

Trustee—Breach of Trust—Unauthorized Investment—Trustee Act, 1893, *Amendment Act*, 1894 (57 & 58 *Vict. c.* 10), *s.* 4.

Sect. 4 of the Trustee Act, 1893, Amendment Act, 1894, has no retrospective operation so as to exempt the trustees of a will from liability for a breach of trust committed before the passing of the Act in retaining an investment of their testator's not authorized by the will or by the general law.

JAMES CHAPMAN, who died in July, 1880, by his will, dated July 15, 1871, appointed his daughter, Martha Ann Chapman, Henry Chapman and James Rollinson his executors and trustees, and gave to them all his real and personal estate upon trust for the said Martha Ann Chapman during her life, with remainder to her children; and in default of such issue the testator, after bequeathing certain legacies, gave his residuary personal estate equally between the children of his two deceased sisters, Mary Green Cocks and Sarah Tyrrell. And the testator directed his

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executors to invest the trust moneys upon good real or Government security.

The greater part of the testator's residuary personal estate consisted of sums of money to a large amount invested on several mortgages on landed properties in Norfolk and Suffolk, all these investments having been made by the testator in his lifetime.

Owing to the agricultural depression prevailing at the testator's death, and the consequent impossibility of realizing the mortgage securities except at a great sacrifice, the executors and trustees determined to postpone their realization, this decision being arrived at mainly, it was said, upon the opinion of Henry Chapman, who possessed considerable experience in such matters.

James Rollinson died in 1889, and Henry Chapman in 1890, leaving Martha Ann Chapman sole surviving executor and trustee of the will.

The testator's deceased sister, Mary Green Cocks, had one child only, John Cocks, who thus became entitled in reversion on the death of Martha Ann Chapman without issue to one moiety of the testator's residuary personal estate.

One Sydney Cozens Hardy lent John Cocks large sums of money on the security of his reversionary interest, and ultimately, in November, 1892, purchased one-third of such interest, remaining mortgagee of the other two-thirds.

In December, 1892, Sydney Cozens Hardy gave Martha Ann Chapman and the executors of the will of Henry Chapman formal notice that he should hold them responsible for the breach of trust committed by James Chapman's trustees in not having immediately after the testator's death invested the trust funds in good and proper securities as required by the will or authorized by law as investments for trust funds; and requiring them forthwith to take all necessary steps to properly invest the trust funds and to make good any deficiency. In consequence of that notice the executors of Henry Chapman's will in 1893 took out an originating summons intituled in the matter of the estates of James Chapman and Henry Chapman against Martha Ann Chapman and Sydney Cozens Hardy with a view

to ascertaining whether the trustees of James Chapman's will were under any liability for having allowed the mortgage securities to remain outstanding; and, if necessary, for administration of the personal estates of James and Henry Chapman respectively.

Upon the hearing of the summons on August 7, 1893, an order was made directing various inquiries as to the mortgage securities.

By his certificate, dated July 3, 1895, the chief clerk certified (amongst other things) that the whole of the outstanding mortgage securities had been improperly allowed to remain outstanding, and ought to have been called in within twelve months from James Chapman's death—that is, not later than the end of July, 1881. But the chief clerk specially reserved for the Court the question, raised by the plaintiffs and the defendant, M. A. Chapman, whether, under and by virtue of the provisions of the Trustee Act, 1893, Amendment Act, 1894, s. 4, they were liable for any breach of trust by reason of their having continued to hold the outstanding mortgage securities as investments authorized by James Chapman's will.

The summons now came for hearing on further consideration adjourned from chambers. At the hearing the plaintiffs, by their counsel, admitted assets of their testator, Henry Chapman.

Warrington, Q.C., and *Gatey*, for the plaintiffs. We submit that s. 4 of the Trustee Act, 1893, Amendment Act, 1894 (1), exempts us from liability for the alleged breach of trust.

It is true that the section is not retrospective in terms, but it is not in any way limited in point of time. It is perfectly general. It is intended to be a rule governing the proceedings of the Court from the time it was enacted. The question raised by the summons was whether the trustees were liable, and the section says distinctly that they shall not be liable.

Marten, Q.C., and *T. L. Wilkinson*, for the defendant M. A. Chapman. That the whole of the Act of 1894 is intended to

(1) Sect. 4 is as follows: "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law."

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have a retrospective operation is shewn by the amendments made in the Act of 1893 by ss. 1, 2, and 3. So that s. 4 ought to be read in connection with ss. 8 and 9 of the Act of 1893, thus adding to the cases in which under those sections a trustee is relieved from liability. The Act of 1893 is retrospective; and the Act of 1894, being only an amending and not an original Act, must be read as part of the former Act, and therefore as equally retrospective, or it may be said to be explanatory of the former: *Attorney-General* v. *Theobald* (1); *Rex* v. *Inhabitants of Dursley* (2); *Freeman* v. *Moyes* (3); *Pardo* v. *Bingham* (4); *Towler* v. *Chatterton*. (5) The Act of 1894 is a remedial Act for the protection of trustees, and follows the remedies in ss. 8 and 9 of the Act of 1893.

Then we have a good defence on the Statute of Limitations or on lapse of time, under s. 8, sub-s. 1 (*a*) and (*b*) of the Trustee Act, 1888.

[KEKEWICH J. But the section only applies in terms to "any action or other proceeding against a trustee." This is not an action or proceeding by a beneficiary "against" a trustee.]

The Court is asked, on the application of the defendant S. Cozens Hardy, a beneficiary, to make a declaration according to the chief clerk's certificate against the surviving trustee, and therefore there is a hostile "proceeding" against the trustee within the section. The Act of 1894 is a relieving Act intended to cut short any liability not actually ripened by judgment.

Warmington, Q.C., and *Micklem*, for the defendant S. Cozens Hardy, were not called upon.

KEKEWICH J. The question I have to decide is whether the 4th section of the Trustee Act, 1893, Amendment Act, 1894, is retrospective or not; that question, reduced to a concrete form, being this. According to the chief clerk's certificate the trustees of the will ought to have called in these mortgages not later than the end of July, 1881. From that time forward,

(1) 24 Q. B. D. 557.
(2) 3 B. & Ad. 465, 469.
(3) 1 Ad. & E. 338.
(4) L. R. 4 Ch. 735, 739.
(5) 6 Bing. 258.

therefore, the trustees were guilty of a breach of trust. They ought at that date, or as soon as possible afterwards, to have realized these securities, but they did not do so. Therefore, when this Act passed in June, 1894, they had for nearly thirteen years been guilty of that breach of trust; and, upon the finding before me, it can scarcely be argued that they were not under an obligation to make good the loss to the trust estate occasioned by that breach of trust: that is to say, they were bound to make good any difference occurring in the realization of the securities and due to their not having called them in before. Then the Act of 1894 says this, in s. 4: "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law." I notice in passing that all I am dealing with now is the liability for breach of trust by reason "only" of the trustees continuing to hold such an investment as is there mentioned: therefore I am dealing only with that particular matter. The question is, therefore, whether this Act was passed to relieve trustees in the position of these trustees from the obligation under which they lay up to that time—an obligation which was not enforced but might have been enforced by the law of the land. There are many cases upon the general doctrine whether an Act of Parliament may be read retrospectively or not, and there are many cases upon the meaning of particular statutes; but one has the general law concisely stated by Lord Hatherley in his judgment in *Pardo* v. *Bingham* (1), where he says (2): "The question is . . . . secondly, whether on general principles the statute ought, in this particular section, to be held to operate retrospectively, the general rule of law undoubtedly being that, except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction." Otherwise you assume it is not retrospective, but you may find that presumption rebutted by a consideration of the subject-matter or by the language of the statute. Then, on the next page, he says: "In fact, we must look to the general scope and purview of the statute,

(1) L. R. 4 Ch. 735. (2) L. R. 4 Ch. 739.

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and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated." Of course that opens up a wide field of inquiry; but no words can better express than those of Lord Hatherley what the duty of the Court is. He says I must look at "the remedy sought to be applied." I must see whether the Legislature, in passing the Act, was minded to relieve trustees from the liability under which they lay at that time. But although I must look at the remedy sought to be applied by the Act, yet I am not entitled to give to these trustees the benefit of any different construction, merely because this is a remedial statute, than I ought to give to any other trustees liable for breach of trust. I must give the Act the best meaning I can: I "must look to the general scope and purview of the statute," and see what was the state of the law at the time it was passed, and what alterations in that law the Legislature contemplated. Now, this is an amending statute: it is a statute passed mainly for the purpose of amending two or three clauses of the Trustee Act, 1893. With the exception of this 4th section, it contains no provisions dealing with the general law at all. There are three sections devoted to amending certain provisions of the Act of 1893. Mr. Marten is right in saying that it is desirable to see what is thus amended. Having looked at those sections and the sections in the Act of 1893 to which he referred, I pass that over. But I find the general scope and purview of the 4th section in the statute itself. It is, no doubt, an amendment of the law applicable to trustees for breach of trust; and this is a subject which has received the attention of the Legislature for some years. There was an Act passed in 1888 of a very large remedial character, and that remained in force until the Act of 1893, and then that Act repealed the whole of the Act of 1888 with the exception of ss. 1 and 8, and re-enacted the repealed remedial sections by other remedial sections, namely, ss. 8 and 9 of the Act of 1893. This Act of 1894 is called an "Amendment Act," and its full title is "An Act to amend the Trustee Act, 1893." There is no reference in it to the Act of 1888; but I may say that the Act of 1888 and the Act of 1893 constitute a code, that is, two

chapters, and the Amendment Act of 1894 must be treated as an amendment of the code of which the Act of 1893 is a part. So that I cannot look at the Act of 1894 without looking at the Act of 1888 as well as the Act of 1893. Therefore it comes to this, that the Legislature must have considered it right to relieve trustees still further than they were relieved up to that time. The Act of 1888 introduced a very large number of cases in which trustees should in future be relieved—cases to which no Act had yet applied any relief.

Sect. 8, sub-s. 3, of the Act of 1888 said: "This section shall apply only to actions or other proceedings commenced after the first day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations." That is to say, that section reserved, in the latter part of it, the right or defence of any executor or administrator to which he was already entitled by statute, but the relief given by the section is only to apply to actions or other proceedings commenced after January 1, 1890.

Then we come to ss. 8 and 9 of the Act of 1893. Sect. 8, which is extremely useful to trustees, protecting them in lending money on mortgage, says (sub-s. 4) that it "applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888." Therefore this section is made expressly retrospective. Again, in s. 9, the Act says, after partially exempting a trustee from liability by reason of improper investments, "This section applies to investments made as well before as after the commencement of this Act except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888." So that, among the provisions which this Act sought to enlarge or amend, I find special provisions for the commencement of the relief or for the reservation of the rights of cestuis que trust. I have nothing of that kind in this Act of 1894; and it is strange that—for some reason that I am not able to fathom—the language of this Act is slightly changed.

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In s. 8 of the Act of 1893 it is said that a trustee shall not be "chargeable" with breach of trust, and so on: that is to say, when he is brought before the Court he shall not be made to pay. But s. 4 of the Act of 1894 says a trustee shall not be "liable." It is strange that the Legislature, which used the word "chargeable" before but uses the word "liable" now, does not state any date at which a trustee's chargeability or liability shall cease. From the general scope and purview of the statute I cannot find anything to shew that this section is retrospective.

Then what was, as Lord Hatherley says, "the former state of the law"? It was that these trustees were in fact liable. The Legislature is supposed, according to the argument on behalf of the trustees, to have contemplated that by one line of a statute the remedy of cestuis que trust should be wholly taken away. I do not think I can assume that they intended to sweep away a remedy of that kind without express words. All I can do is to construe the statute as well as I can, and I see difficulties in doing so; but I do not see how I can relieve these trustees from any liability they were under when the Act of 1894 was passed.

There must, therefore, be a declaration that the executors of the deceased trustee, Henry Chapman, and the defendant M. A. Chapman, are liable jointly and severally to make good to their trust estate, the estate of James Chapman, the deficiency on these mortgages. And as the plaintiffs admit assets of their testator, Henry Chapman, they are also liable personally to make good the loss. Of course M. A. Chapman, as tenant for life, will receive nothing out of James Chapman's estate until the loss has been made good.

Solicitors: *H. A. Maude, for Francis & Back, Norwich; Waterhouse, Winterbotham & Co.*

G. I. F. C.

In re KINGSTON COTTON MILL COMPANY (No. 2).

VAUGHAN WILLIAMS J.

1895

Dec. 5, 6, 9, 10, 11, 12, 13, 18.

[0098 of 1894.]

Company — Winding-up — Misfeasance — Directors — Auditors — False Balance-sheets — Payment of Dividends where no Profits — Duties as to Stock-taking — Ultra vires — Damages for Improper Continuation of Business — Remoteness — Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

"Misfeasance" in s. 10 of the Companies (Winding-up) Act, 1890, covers every misconduct by an officer of a company, as such, for which he might, apart from the section, have been sued, and includes the case of an auditor who, either knowingly or through failure to use reasonable skill and care, certifies accounts which ought not to have been certified, provided the direct result is pecuniary damage to the company.

Directors who pay away the funds of their company honestly, and reasonably believing in a state of facts which would justify the payment, are not bound to replace the funds because it subsequently turns out that on the true facts the payment was ultra vires.

An ordinary trading company (as well as an investment company, and a company formed to work a necessarily wasting property) may lawfully pay a dividend to shareholders out of current profits, without setting aside a sum sufficient to cover depreciation in the value of the fixed capital.

Ordinary directors of a company are entitled to rely on certificates of its manager as to the value of its stock-in-trade; but auditors, although it is no part of their duty to take stock, are not entitled to rely on the manager's certificate if an ordinary careful examination of the books ought to have made them suspect the truth of it.

For some years before a company was wound up balance-sheets, signed by its auditors, were published by the directors to the shareholders, in which (1.) the value of the company's mill and machinery, and (2.) the value of its stock-in-trade, were greatly overstated. The directors and one of the two auditors knew that (1.) was an overvalue, but none of them knew that (2.) was, but they believed and relied on certificates, deliberately false, given by J., one of the directors who was also manager. Dividends were for some years paid on the footing that the balance-sheets were correct. If the excess in value in respect of (1.) and (2.), or either of them, had been deducted, there would have been no profits available for dividend. But taking the stock-in-trade at the amounts stated in the certificates, and the mill, machinery, and site at their true value, the company was not insolvent until the last year of its existence.

In the winding-up of the company it was sought to make the directors and auditors liable (*a*) for the dividends, (*b*) for the damages alleged to

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have resulted from continuing the company's business on the footing that the balance-sheets were correct :—

Held, that the directors, other than J., were not, though the auditors and J. were, liable for the dividends, but that the damages were too remote, and neither the directors nor auditors were liable for them.

THE Kingston Cotton Mill Company, Limited, was formed in 1879 for the purpose primarily of effecting a reconstruction of an unlimited company named the Kingston Cotton Mill Company. The principal objects of the new company were to "purchase or otherwise acquire and undertake all or any part of the business property and liabilities of the" old company; and to "purchase, prepare, spin, manufacture, and deal in cotton, yarn, and other fibrous products and materials, and to carry on the business of spinning" and otherwise "treating cotton goods and other goods of the like kind."

At the time of the reconstruction the old company's mill was subject to a mortgage for 30,000*l*.

Clauses 129 to 140 of the articles of association related to audit of the company's account, clause 140 being as follows :—

"The auditors shall make a report to the members upon the balance-sheets and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these articles, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs; and in case they have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory; and such report shall be read, together with the report of the directors at the ordinary meeting."

The other audit clauses are set out in the report of *In re Kingston Cotton Mill Co.* (1).

Samuel Lambert, Andrew Mouat, Vincent Henry Parker, George Gladstone Macturk, and John William Halden were directors of the company from the time of its formation until it was ordered to be wound up.

William Jackson was the general manager until September,

(1) Ante, pp. 7–9.

1882, when he became a director, and from that time until the winding-up order he held both offices.

Benjamin Pickering was the sole auditor up to the end of 1891, and in that capacity signed all the balance-sheets.

Early in 1892 his firm of Pickering, Peasegood & Judge, chartered accountants (of which firm Arthur Edgar Peasegood was a member) were appointed auditors, and the balance-sheet for 1892 was signed by the firm in March, 1893.

In the summary of accounts accompanying the report of the directors for the year 1879, and issued in 1880, under the head of assets there was an item, "Mill, machinery, and site, construction account, as before, 227,048*l.*" The next item, "New machinery," 327*l.* was added, making a total of 227,375*l.*, from which was deducted "Depreciation written off, 4046*l.*," leaving a balance of 223,329*l.*

In December, 1884, the directors procured, for the purpose of obtaining a loan on mortgage, a valuation by Messrs. Grundy & Son of Manchester, in which the total value of the mill, site, machinery, and certain articles in the shape of plant was put down at 76,833*l.* No reference to this valuation was made in any subsequent reports of the directors, and in the balance-sheets for 1889, 1890, 1891, and 1892 the following item appeared: "Mills, machinery, and site, with new packing plant, economizer, new steel boilers, compounded engines, and new boiler-house, as per construction account—196,610*l.* 0*s.* 7*d.*"

In the accounts accompanying the directors' report for 1889–1892 the "stock-in-trade 31st December" was stated to be—for 1889, 29,760*l.* 3*s.* 2*d.*; for 1890, 44,482*l.* 10*s.* 9*d.*; for 1891, 53,918*l.* 5*s.* 1*d.*; and for 1892, 60,966*l.* 5*s.* 6*d.*

The same figures in respect of stock-in-trade were given in the balance-streets for the same years, the words "as per manager's certificate" being added in each case.

On the debit side of the balance-sheets for 1889–1892, under the heading of liabilities "Reserve fund was stated to be: in 1889, 7031*l.* 10*s.* 3*d.*; in 1890, 8268*l.* 12*s.* 1*d.*; in 1891, 9052*l.* 0*s.* 11*d.*; and in 1892, 4753*l.* 11*s.* 7*d.*

The accounts were generally made up yearly in the month of February to December 31 in the previous year.

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On April 18, 1894, an order was made for the winding-up of the company by the Court.

The official receiver and liquidator on February 11, 1895, took out a summons against Lambert, Mouat (who died before the hearing), Parker, Macturk, Halden, Jackson, Pickering, and Peasegood, asking for a declaration that the first six respondents, as directors, and Pickering, as a past auditor of the company, were jointly and severally liable to pay to the applicant four sums of 36*l.* 0*s.* 10*d.*, 38*l.* 12*s.* 4*d.*, 38*l.* 12*s.* 4*d.*, and 38*l.* 17*s.* 4*d.*, which being moneys of the company were improperly applied in payment of dividends on certain preference shares in the company for the years 1890–1893, with interest from the date of payment, and that Peasegood, as a past auditor, was also liable to pay the sums of 38*l.* 12*s.* 4*d.* and 38*l.* 17*s.* 4*d.*, applied as aforesaid for 1892 and 1893, with interest; and for an order for payment of the amounts.

The summons also asked for a declaration with respect to each and all of the respondents (but as to Peasegood only as from the date when his firm became auditors of the company) that they respectively were guilty of misfeasance or breach of trust in relation to the company in that they respectively had authorized, sanctioned, participated in, recommended, or permitted, the issue and circulation of divers reports and statements of accounts of the company, and in particular those for the years 1884 to 1892, inclusive, containing false and misleading entries with respect to

(i.) the value of the company's mill, machinery, and site;

(ii.) the value of the company's stock-in-trade, particularly for 1887 and the subsequent years;

(iii.) the company's reserve fund;

and that by reason of the said misfeasances or breaches of trust, the respondents, other than Peasegood, had become and were jointly and severally liable, either to pay the applicant 80,770*l.* 10*s.* (representing the company's trading loss since 1884) or other the sum total of the loss occasioned or resulting to the company by or from the said misfeasances or breaches of trust; and that Peasegood also had become and was liable to pay to the applicant such due proportion of the said sum or

sums total as the Court might prescribe; and that the respondents respectively might be ordered jointly and severally to make the payments for which they were liable as last aforesaid within a time to be limited by the Court, or, in the alternative, that the respondents might be ordered to contribute such sums of money to the assets of the company by way of compensation in respect of the said misfeasances or breaches of trust respectively as the Court might think just.

The summons was adjourned into court and heard before Vaughan Williams J. on December 5, 6, 9, 10, 11, 12, 13, 1895.

At the hearing of the summons it was admitted that the claims made by it must be confined to matters which had occurred within the six years immediately preceding the date of the issuing of the summons.

The revenue accounts in the years in which, on this assumption, it was alleged that dividends had been improperly paid, purported to shew a sufficient profit for payment of the dividends; but this was because nothing had been allowed for depreciation in the value of the company's mill, machinery, and mill site, and because the stock-in-trade was greatly overvalued. The figures in the balance-sheets stating the value of the stock-in-trade were accepted by the directors and auditors on the faith of certificates given by the manager Jackson, without further inquiry. Vaughan Williams J. found that the real value of the mill, machinery, and site was not half the amount stated in the balance-sheets as their value, and that the directors and Pickering, but not Peasegood, knew this.

The value of the stock-in-trade was much less than that stated in the balance-sheets to an increasing extent in each year subsequent to 1887; but neither the directors nor the auditors knew this, they having believed that Jackson's certificates were true, whereas he deliberately gave certificates which he knew to be false.

If from the amount stated in the balance-sheets as the value of the assets, the excesses in value of the mill premises and the stock together, or the excesses in value of either of them, had been deducted, there would have been no sum left which would

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have been available for the payment of dividends. His Lordship, however, found that the directors in fact paid the dividends complained of in the honest and reasonable belief that the necessary profits had been earned, and that even if the auditors had complied with art. 140, this would not have led to the discovering of the manager's fraud. The auditors had not made reports on the accounts as required by art. 140. His Lordship also found that if the value of the stock-in-trade, as stated by the manager, was added to the true value of the mill, machinery, and site, the company was not insolvent until the last year of its existence; but that, if the auditors had added to the alleged value of the stock-in-trade at the beginning of any year the amount spent in purchasing raw material during that year, and had then deducted the amount of the year's sales, they would have seen that the statement of the value of the stock-in-trade at the end of the year required explanation.

He also found that the fact that the company continued to carry on business after the misstatements as to values had been made was not proved to have been the consequence of the misstatements.

Cozens-Hardy, Q.C., *W. D. Rawlins*, and *Marshall Hall*, in support of the summons. Both the directors and the auditors have been guilty of misfeasances in respect of which they are liable under s. 10 of the Companies (Winding-up) Act, 1890.

The balance-sheets and accounts were false to the knowledge of the directors.

Much of the capital had been lost and not replaced, and the reports were misleading, and overstated the value of the stock-in-trade. Under these circumstances, there was no sum available for the payment of dividends, yet dividends were paid, and improperly, as they were paid out of capital: *In re Oxford Benefit Building and Investment Society*. (1)

[VAUGHAN WILLIAMS J. referred to *Lee* v. *Neuchatel Asphalte Co.* (2)

Haldane, Q.C., referred to *Verner* v. *General and Commercial Investment Trust*. (3)]

(1) 35 Ch. D. 502. (2) 41 Ch. D. 1. (3) [1894] 2 Ch. 239.

In *Verner* v. *General and Commercial Investment Trust* (1) the company was not a trading company.

In *Lee* v. *Neuchatel Asphalte Co.* (2) the property of the company was of a wasting nature—a fact which was particularly relied on in the Court of Appeal. (3)

Jackson, one of the directors, admits that he deliberately inflated the stock accounts, and the other directors were guilty of gross negligence amounting to a breach of duty.

The duty of the auditors was to see that the accounts were in accordance with the facts.

The auditors will say it was no part of their business to take stock; but there was sufficient on the face of the accounts to put them on inquiries which would have resulted in its being shewn that the stock was greatly overvalued. The omission was gross negligence amounting to misfeasance.

The losses which accrued after 1889 were the direct result of the reports, which enabled the company to obtain credit, and led to the company continuing to carry on business. The shareholders would have stopped the business long ago if they had known the true position of the company.

The directors and auditors are therefore liable to compensate the company for the loss sustained by continuing to carry on the business.

Both the directors and auditors fell short of the standard of duty required by their own articles of association and by the Court; and officers of a company, especially its directors, cannot be heard to say that they were ignorant of the contents of their own articles. The directors allowed the auditors to neglect to make reports, and, having deprived themselves of this protection, they went to sleep.

If the mill was put down at cost price, a large amount should have been put down for depreciation on the other side of the account, and it would not be right to call it reserve.

Placing unlimited confidence in subordinates, reckless negligence, and wilful shutting of the eyes, are all acts which amount to misfeasance.

(1) [1894] 2 Ch. 239. (2) 41 Ch. D. 1.
(3) 41 Ch. D. 24.

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Under the latter part of sub-s. 1 of s. 10, the Court can assess damages to be paid by the respondents.

[They also referred to *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1); *In re London and General Bank* (No. 2). (2)]

Farwell, Q.C., and *E. C. Macnaghten*, for Lambert. There is no cause of action against Lambert. Sect. 10 of the Act of 1890 is substantially the same as s. 165 of the Companies Act, 1862, and neither section creates new rights, but merely substitutes a summary remedy for acts for which an action lies: *Coventry and Dixon's Case* (3); *Bentinck* v. *Fenn.* (4)

Non-feasance is not within the section, and Lambert is only charged with others with having made omissions. Directors are under no obligations to make annual valuations and write down their capital in accordance with the valuations. The valuation relied on was made with a view to a mortgage on the company's property. It was right to put down the original cost price of the mill and plant in the capital account, and the directors were not bound to make entries in respect of depreciation. A reduction of capital could not be effected without an application to the Court. The loss of money borrowed by the company is not a loss of the company's money, and the directors cannot be called on to replace the amount. As regards the inflation of the balance-sheets, the directors were deceived by the manager, whom they were justified in relying on. He was an expert whom they were entitled to trust: *Land Credit Co. of Ireland* v. *Lord Fermoy* (5); *Barnard* v. *Bagshaw.* (6) It is not the duty of directors to examine entries in the company's books: *In re Denham & Co.* (7) They are not trustees for the creditors of the company, and the creditors have no larger rights as against them than as against other members of the company: *Poole, Jackson and Whyte's Case.* (8)

It does not necessarily follow that because there is depreciation in the capital value of the property the payment of dividends

(1) 36 Ch. D. 787.
(2) [1895] 2 Ch. 673.
(3) 14 Ch. D. 660.
(4) 12 App. Cas. 652, 669.
(5) L. R. 5 Ch. 763.
(6) 3 D. J. & S. 355.
(7) 25 Ch. D. 752.
(8) 9 Ch. D. 322.

is improper: *Lee* v. *Neuchatel Asphalte Co.* (1); *Verner* v. *General and Commercial Investment Trust.* (2)

The directors are not liable unless from their wrongful act the company has suffered damage which is the direct consequence of that Act: *Walker* v. *Goe* (3); *Waddell* v. *Blockey.* (4) The Court cannot assume a winding-up would have taken place at any particular time if the shareholders had known all the facts, and the loss cannot be held to be the consequence of the business not having been discontinued sooner.

There is no evidence that any one was deceived.

The reserves are only material as covering depreciation and other matters which lessen the value of the assets.

The directors, having acted honestly, ought not to be declared liable.

[They also referred to *Rance's Case* (5), *In re Midland Land and Investment Corporation* (6), and *Marzetti's Case.* (7)]

Haldane, Q.C., *Swinfen Eady, Q.C.*, and *Eve, Q.C.*, for Pickering and Peasegood, the auditors. Auditors are experts who are bound to use reasonable skill and intelligence, but are in a different position from that of directors; and they are not trustees. As s. 10 of 1890 created no new rights or liabilities, an action against the auditors would have to be based either on deceit or on breach of contract to use reasonable skill. To ground an action of deceit the plaintiff must prove (*a*) a misrepresentation; (*b*) knowledge that the statement was untrue; (*c*) that the statement was relied on; (*d*) damage directly resulting from acting on the statement. The evidence here would not support an action of deceit; and the applicant, therefore, can only succeed by shewing that there has been a breach of the contractual duty to be skilful.

We wish to reserve the questions—(1.) whether the auditors were officers of the company within the meaning of s. 10, the decision of the Court of Appeal on this point (8) being under

(1) 41 Ch. D. 1.
(2) [1894] 2 Ch. 239.
(3) 3 H. & N. 395; 4 H. & N. 350.
(4) 4 Q. B. D. 678.
(5) L. R. 6 Ch. 104.
(6) Unreported. The judgment is set out in Palmer's Company Precedents, 6th ed. part i. p. 440.
(7) 42 L. T. (N.S.) 206.
(8) Ante, p. 6.

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appeal to the House of Lords; (2.) whether in a case of mere negligence the Court has jurisdiction under the section.

There is only one case apparently—*In re London and General Bank* (1)—in which an auditor has been declared liable on a misfeasance summons. *Leeds Estate Building and Investment Co.* v. *Shepherd* (2) was an action.

[VAUGHAN WILLIAMS J. Any objection to the jurisdiction must be taken now.]

Then we do object that, assuming the case alleged against the auditors is proved, it is only one of negligence, and not, as the section requires, a misfeasance in the nature of a breach of trust: *Bentinck* v. *Fenn* (3); *In re London and General Bank* (1); *In re London and General Bank* (No. 2) (4); *In re Liberator Permanent Benefit Building Society* (5); *Coventry and Dixon's Case.* (6)

An action at common law would not have lain against an auditor for mere negligence, and he is not liable for a mere error of judgment.

Cozens-Hardy, in answer to the objection as to jurisdiction. The argument on behalf of the auditors gives no effect to the words in s. 10 "to contribute such sums of money to the assets of the company by way of compensation in respect of such . . . . misfeasance . . . . as the Court thinks just."

The claim is made for compensation for loss resulting from the misconduct of officers of the company. In *In re London and General Bank* (1) the ground of the decision against the auditor was not fraud or breach of trust, but breach of duty by an officer of the company. *Coventry and Dixon's Case* (6) is not inconsistent with that. The amount of compensation, like a debt, can be recovered from the company's officer: *Lister & Co.* v. *Stubbs* (7); *Archer's Case.* (8)

Haldane, in reply as to the objection, and on the question of contract. Non-feasance will not create liability: *In re Wedg-*

(1) [1895] 2 Ch. 166.
(2) 36 Ch. D. 787.
(3) 12 App. Cas. 652, 669.
(4) [1895] 2 Ch. 673.
(5) 71 L. T. (N.S.) 406.
(6) 14 Ch. D. 660.
(7) 45 Ch. D. 1.
(8) [1892] 1 Ch. 322.

wood Coal and Iron Company. (1) *Archer's Case* (2) is in our favour.

[VAUGHAN WILLIAMS J. referred to *Davies' Case*. (3)]

There is no liability as constructive trustees where no property of the company has come to the hands of its officers: *In re Forest of Dean Coal Mining Co.* (4); *Barnes* v. *Addy*. (5)

[VAUGHAN WILLIAMS J. I shall not stop the case on this objection, but shall deal with the objection in my judgment.]

If the case against the auditors is based on the allegation that they have broken a contract to use reasonable skill, it must be shewn that they have been guilty of gross negligence or gross ignorance of their duty—mere error of judgment is not enough: *Purves* v. *Landell*. (6) The duties of an auditor are pointed out in *In re London and General Bank*. (7) Nothing occurred in this case to awake the auditors' suspicions. *Walker* v. *Goe* (8) is in their favour.

Verner v. *General and Commercial Investment Trust* (9) shews that depreciation does not stand in the way of distributing profits when the company is solvent; and down to 1892 the company was, as regarded creditors, perfectly solvent. The balance-sheets were not grossly wrong. They may not have been perfect or ideal balance-sheets, but the auditors are not liable on that ground. It was not the duty of the directors to stop business, for the situation was not hopeless. The damage claimed is not the natural result or proximate consequence of what was done. The directors, quâ directors, could not have stopped the business. It would have been a question for the shareholders, many of whom were sanguine people.

It was not the duty of the auditors to go and examine the bales of cotton. The stock-taking could only be done by experts. Are the auditors of an insurance company bound to value the policies? It must have been known that, as to some items, they acted on information.

(1) 47 L. T. (N.S.) 612.
(2) [1892] 1 Ch. 322.
(3) 45 Ch. D. 537.
(4) 10 Ch. D. 450.
(5) L. R. 9 Ch. 244.
(6) 12 Cl. & F. 91.
(7) [1895] 2 Ch. 166.
(8) 3 H. & N. 395; 4 H. & N. 350.
(9) [1894] 2 Ch. 239.

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Yate Lee, for Halden and Macturk. The position of Halden is different from that of the other directors, inasmuch as for ten years he never went near the mill or took any part in the management of the company, and his case, therefore, is governed by *In re Denham & Co.* (1) and *Marquis of Bute's Case.* (2)

As to Macturk's case, I adopt Mr. Farwell's argument, and say further that to any one but an expert the balance-sheets shew balances available for the payment of dividends.

It is not sufficient that an individual shareholder or creditor suffered; to make the directors liable it must be shewn that damage resulted to the company in its corporate capacity.

A. àBeckett Terrell, for Parker. There is no liability under s. 10 of 1890 in respect of damages for deceit or negligence sounding in damages, because in either case the company would have no right of action against the directors. They are in the position of partners selected to manage the business—not of persons employed by the company—and therefore are not liable to an action for negligence. [He also referred on this point to *Derry* v. *Peek.* (3)]

The directors' statements did not induce the company to continue its business; it could only act through them as its agents, and they could not deceive themselves. [He also cited *Wilmer* v. *McNamara & Co.* (4)]

Jackson appeared in person, but did not argue his case.

Cozens-Hardy, Q.C., in reply, cited *In re Oxford Benefit Building and Investment Society* (5) and *Leeds Estate Building and Investment Co.* v. *Shepherd.* (6)

1895. Dec. 18. VAUGHAN WILLIAMS J. This is a summons under s. 10 of the Companies (Winding-up) Act, 1890, which is practically a re-enactment of s. 165 of the Companies Act, 1862. The respondents are respectively the directors and auditors of the company, and it is common ground that the summons is now to be confined to matters which occurred within six years

(1) 25 Ch. D. 752.
(2) [1892] 2 Ch. 100.
(3) 14 App. Cas. 337.
(4) [1895] 2 Ch. 245.
(5) 35 Ch. D. 502.
(6) 36 Ch. D. 787.

prior to the issue of the summons. [His Lordship stated the effect of the summons, and continued :—]

In so far as the summons charges improper application of moneys of the company in the payment of dividends, the answer of the respondents is that the payments were not an improper application, because of the two accounts of the company the revenue account in the years in question shewed a sufficient profit for payment of the dividends, because there is no obligation on the company to deduct losses in respect of fixed capital before arriving at the profit balance, and that, in so far as the deduction of the sums appearing in the balance-sheet in excess of the true value of the stock-in-trade is concerned, the actual figures appearing in the balance-sheet were accepted by the directors under the certificate of the manager; and that the directors were guilty of no want of reasonable skill and care in the performance of their duties by accepting such certificate of the manager without further inquiry, and that the directors accepted such figures in good faith and in the belief that they were true. And the auditors say that in the balance-sheets and accounts which they certified the figures in respect of the stock-in-trade were stated, as the fact was, to be by the manager's certificate, and that the auditors had no duty to go behind that certificate, and shewed no want of reasonable skill and care in abstaining from so doing, since they believed the certificate to be true and had no ground for suspecting the contrary. But, in so far as the summons charges the directors with the issue and circulation of reports and accounts containing false and misleading entries with respect to the company's mill, machinery, and site, and the value of the company's stock-in-trade for the year 1887 and the subsequent years, and charges the auditors with sanctioning the same, it is urged that such misconduct or failure of duty, if proved, cannot properly be made a subject of the misfeasance summons, not being a breach of trust, at all events so far as the charge relates to the auditors.

I think that, perhaps, I had better deal with the preliminary objection to my jurisdiction to entertain these claims under a misfeasance summons. [His Lordship read sub-s. 1 of s. 10 of the Act of 1890, and continued :—]

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It seems to me that the word "misfeasance" covers every misconduct by an officer of the company as such for which such officer might have been sued apart from the section. The charge against the auditors here is that they, either knowingly or through the failure to use reasonable skill and care, certified accounts which ought not to have been certified. This is misconduct for which, in my opinion, either the company when solvent or the company in liquidation could have sued the auditors and recovered any pecuniary damage actually sustained by the company. It is said that this is contrary to the dicta of the Lords Justices, and in particular the dictum of James L.J. in *Coventry and Dixon's Case* (1), when he said that "misfeasance" means "misfeasance in the nature of a breach of trust"—improper retention or application of the moneys or property of the company, or misfeasance by which the company's property has been improperly wasted or the company's credit improperly pledged to the pecuniary loss of the company. Now I would first observe that this dictum was not necessary for the decision of the case; all that was necessary to be decided or was decided in *Coventry and Dixon's Case* (1) was, as is pointed out by Jessel M.R. in *Flitcroft's Case* (2), that an officer would not be liable to be proceeded against under s. 165 of the Companies Act, 1862, unless he was guilty of some misconduct for which he might have been sued apart from the section—not, it will be observed, apart from the Act; secondly, it is to be remembered that the respondents in *Coventry and Dixon's Case* (1) were de facto directors, and that the Lords Justices are speaking of the liability of directors rather than of officers generally. At all events, the case of *Leeds Estate Building and Investment Co.* v. *Shepherd* (3) is conclusive to shew that the failure to use reasonable skill and diligence will render an auditor liable to an action for damages. And *Davies' Case* (4) shews that the omission or neglect by a trustee and manager of a savings bank to comply with certain statutory provisions as to audit may constitute a misfeasance within the meaning of the section. I hold in the present case that the charges against

(1) 14 Ch. D. 660, 670.
(2) 21 Ch. D. 519.
(3) 36 Ch. D. 787.
(4) 45 Ch. D. 537.

the auditors of having, through want of the exercise of ordinary skill and diligence, sanctioned accounts containing false statements do, if they are proved and coupled with pecuniary damage to the company, constitute a misfeasance within the meaning of this section.

I will now proceed to deal with the question of how far, on the evidence before me, the charges against the directors and auditors respectively have been proved. In my judgment, it is proved that the mill was not of the value mentioned in the accounts published by the directors. I think that the figure therein mentioned purports to be value and not cost, and that the directors knew that the value of the mill, machinery, and site was not half the value mentioned in the balance-sheets, and that the respondent Pickering knew this, but not the respondent Peasegood. I think, further, that the value of the stock-in-trade was much less than that stated in the balance-sheet, to an increasing extent in each year subsequent to 1887, but that neither directors nor auditors were aware of this, they having acted upon the certificate of the manager, Jackson, believing the same to be true, and Jackson having admitted that he deliberately gave false certificates. I find that the directors acted reasonably in accepting the certificate of the manager. I postpone what I have to say as to the auditors' conduct in this relation. I find, further, that on the true state of accounts, if you deduct from the assets the excess in value put upon the mill and the stock-in-trade, there were no profits out of which the dividends could be paid, and the same is true if you deduct the excess in either respect.

Having found these facts, I will answer, in the light of them, first the question whether the directors are liable in respect of the dividends. With regard to the excess in value of the stock-in-trade, I should hold, if I were free to decide this case according to my own judgment, that a director is in no sense a trustee. The Act does not say that a director is a trustee. He is not the owner of the funds which he has to apply; and I should have thought that he might safely be treated as the paid manager and agent of the company, and might well be held not to be responsible for the misapplication of the funds of the

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company unless he, through want of care or fraud, misapplied those funds. If it is said that, if his responsibility were thus defined, he would not be responsible if, by the direction of the shareholders, he applied the funds to a purpose which the company could not authorize because it was a purpose ultra vires, my answer would be that, if he did so without carelessness or fraud, he ought not to be held liable, and that if he did so knowing that the purpose was ultra vires, or carelessly, he ought to be held responsible, not because he is a trustee, but because the ownership of the company is limited—i.e., is limited to the application of the funds to the statutory purposes—and his duty to the company as manager is not knowingly or carelessly to apply the funds to a purpose ultra vires of the company, even though he may have the authority of the shareholders; for a company does not seem to me, in regard to questions of ultra vires, to be an aggregate of the shareholders, but a substantive legal entity. I do not think that any one can doubt that thus to define the duties of a director is more in accordance with commercial necessity and the sense of the commercial community than it is to hold directors liable to refund dividends which they have misapplied without fraud or carelessness, on the ground that legal principles compel lawyers to hold them liable in such a case as trustees or quasi-trustees. Nor is the view which I have suggested without high legal authority, for it seems to me that it is the basis of the decision of Chitty J. in *In re Denham & Co.* (1), and of the dicta of James and Mellish L.JJ. in *Rance's Case.* (2) James L.J. says (3): "If the directors, by placing unfounded reliance upon the representations of their servants or actuaries, had arrived at the conclusion that they had made a divisible profit, this Court ought not, I say, to sit as a Court of Appeal from that conclusion." And Mellish L.J. says (4): "I quite agree that if directors or a proper actuary had made out a profit and loss account the Court ought to assume, very strongly indeed, that it was a correct account, and ought not without very strong reasons shewing it was done malâ fide, to set it aside, or declare

(1) 25 Ch. D. 752.
(2) L. R. 6 Ch. 104.
(3) L. R. 6 Ch. 118.
(4) Ibid. 122.

a dividend made upon it improper." It is to be remembered that in arriving at a conclusion on the question whether a divisible profit has been made or not the directors must, in regard to unrealized property, base their answer upon an estimate, and the judgment in *Stringer's Case* (1) goes upon the assumption that directors who have exercised an honest but oversanguine judgment are not to be held liable for the payment of dividends where events subsequently shew that there were no profits out of which they could be declared. The point in *Stringer's Case* (1) was not as to repayment of dividends, but arose on an application for an injunction.

There is, however, a considerable bulk of authority to shew that directors are trustees for the company of such funds as are committed to their control in such sense that they will be liable for a misapplication of the funds which is ultra vires of the company, independently of any proof of fraud or actionable negligence by the directors. The authorities as to the liability of directors as trustees seem to begin with the case of *In re National Funds Assurance Co.* (2), followed by *Flitcroft's Case* (3), and more recently by *In re Oxford Benefit Building and Investment Society* (4), by *Leeds Estate Building and Investment Co.* v. *Shepherd* (5), and by *In re Faure Electric Accumulator Co.* (6); but in no one of those cases can I find that directors were held liable unless the payments were made either with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation. Take, for example, *In re Faure Electric Accumulator Co.* (6), in which Kay J. expressly finds that no imputation whatever is to be made upon the honesty or honourable conduct of the directors, but proceeds to find them liable for having committed breaches of trust in making certain payments out of the money of the company which were ultra vires, the purpose for which the payment was made being known to the directors, although they were ignorant of its illegality, as, indeed, were many, if not a majority of the legal profession. On the whole, I have come to the conclusion

(1) L. R. 4 Ch. 475.
(2) 10 Ch. D. 118.
(3) 21 Ch. D. 519.
(4) 35 Ch. D. 502.
(5) 36 Ch. D. 787.
(6) 40 Ch. D. 141.

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that there is no such bulk of authority as binds me to hold that directors who pay away the funds of the company under an honest and reasonable belief in a state of facts which would justify the payments must be held liable to replace those funds because it turns out that on the true facts the payments were ultra vires.

Having arrived at this conclusion in law, it remains for me to inquire on this part of the case whether these directors in fact paid away these dividends in the honest and reasonable belief that the necessary profits had been earned. I have not the slightest doubt but that they honestly believed it, and that the grounds of their belief were the statements of the manager, whom they had no reason to suspect. The only matter to be urged against them is that the auditors, to their knowledge, did not comply with art. 140. [His Lordship read the article, and continued:—]

But, in my judgment, compliance by the auditors with the provisions of art. 140 would not have led to the discovery of the fraud of the manager. With regard to the overstatement of the value of the mill and machinery, it seems to me that, even assuming this statement to be a statement of value and not of cost, it is not, having regard to the decisions in *Lee* v. *Neuchatel Asphalte Co.* (1) and *Verner's Case* (2), a material misstatement so far as the declaration of the dividend is concerned, because, even assuming that to the knowledge of the directors such a depreciation in the value of the fixed capital had occurred as suggested, it would not make the declaration of the dividend ultra vires nor prevent the payment of a dividend out of the excess of current receipts over current payments. It is no part of my duty to express an opinion on these decisions. I have only to follow the principles laid down within them provided I think that the facts of the present case are governed by those principles. It is true that the present case is not the case of a company formed to work a necessarily wasting property as was the case in *Lee* v. *Neuchatel Asphalte Co.* (1), nor the case of an investment company as in *Verner's Case* (2); but I think that this case falls within the principles of those two cases read together.

(1) 41 Ch. D. 1. (2) [1894] 2 Ch. 239.

The remaining charge against the directors is that they, by the misstatements in the balance-sheets as to the assets of the company in regard to the mill and machinery and the stock-in-trade, were guilty, at all events in respect of the mill, of making a statement as to the value of the assets which they knew to be untrue, and that the company has been damaged thereby by continuing to trade on the assumption that the assets were of the value stated in the balance-sheet, and that the directors are liable to make good the losses of the company while it continued so to trade. It seems to me that the directors are not so liable, because, in my judgment, the damages are too remote, and are not proved in fact to have been the consequence of the misstatement in question. The suggestion that such damages may be treated as resulting from the overstatement of the value of the assets seems to be based principally on a passage in the judgment of Stirling J. in *Leeds Estate Building and Investment Co.* v. *Shepherd* (1); but Stirling J. arrived at no such finding in fact, and in the present case I do not think I can do so. The company, if one takes the stock-in-trade on the manager's statement and then calculates the assets with the mill, &c., at their true value, does not seem to me to have been insolvent until the last year of its existence; and it is to be remembered that so long as the mill was a going concern the mortgagees were not likely to call in their debt. I know it is said that the mortgagees would have called in the debt but for having the accounts shewn to them with the inflated value of the mill; but I think that there is no proof of this in fact. I therefore hold that the directors are not liable in respect of any of the charges mentioned in the misfeasance summons. I am not sorry so to hold, because I think that the directors who held half the share capital of the company honestly tried to do their duty.

With regard to the auditors the case is more difficult. They are, of course, entitled to the benefit of my decision with respect to the dividends, so far as it is based on *Lee* v. *Neuchatel Asphalte Co.* (2) and *Verner's Case* (3), and in regard to the remoteness of the damage; but with regard to the stock-in-

(1) 36 Ch. D. 787. (2) 41 Ch. D. 1. (3) [1894] 2 Ch. 239.

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trade their case is very different from that of the directors, for they certainly were not entitled to rely upon the manager's certificate if an ordinary careful examination of the books ought to have made them suspect that statement. Now, it is plain to me that if the auditors had added to the stock-in-trade at the beginning of any year the purchases of raw material in that year, and had deducted therefrom the sales, they must have seen that the statement of the stock-in-trade at the end of the year was so remarkable as to call for explanation, and they called for none. It is said that it is no part of the duty of an auditor to take stock. I agree it is not; but when it is said that it is no part of his duty to test the accuracy of the manager's certificate by a comparison of the figures in the books that require auditing, I cannot agree. I think, therefore, that I must hold the auditors liable for the preference dividends which have been paid, with such costs as are applicable to this part of the case; and, having regard to the mode in which the auditors disregarded the articles as to the audit and the manner in which the audit was carried out, I do not think they ought to receive any costs. I think the directors ought to have their costs.

The respondent Jackson must be declared liable for the dividends improperly paid and the costs. If the auditors can distinguish between the costs which can be attributed to charges of fraud having been made and the costs of claims not involving a charge of fraud, they will not have to pay the former, but it will be difficult to make the distinction. The official receiver has only done his duty in making the inquiry, and will not be personally liable for any costs. He must, however, pay the costs ordered to be paid out of the assets at once, and not postpone the payment to other charges.

Solicitors for official receiver and liquidator: *Robbins, Billing & Co.*

Solicitors for Lambert: *Patersons, Snow, Bloxam & Kinder.*

Solicitors for Parker: *Chester, Mayhew, Broome & Griffithes.*

Solicitors for Macturk and Halden: *Hicks & Son, for Leak, Till & Stephenson, Hull.*

Solicitors for auditors: *Collyer-Bristow, Russell, Hill & Co.*

F. E.

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[1865 H. 101.]

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Will—Administration—Bequest of Annuity payable out of Residue—Provision for Annuity—Distribution of Residue—Jurisdiction—Appeal—Costs improperly incurred—Payment by Solicitor—Rules of Supreme Court, 1883, *Order* LXV., *r.* 11.

Where an annuity is payable out of the clear residuary estate of a testator, the Court has jurisdiction to set apart a sufficient sum to answer the annuity, and to pay the remainder of the residue to the residuary legatees. And this jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant.

Per Lindley L.J.: The annuitant has nevertheless the right to resort, if it becomes necessary, to the corpus of the fund set apart.

In an administration action, where several respondents to an unsuccessful appeal were in the same interest, the Court allowed only one set of costs against the appellant, and directed those costs to be paid to the respondent who had the conduct of the proceedings in the cause.

The solicitor of an appellant will be ordered to indemnify his client against the costs of the appeal, if it was prosecuted, not in the interests of the client, but for the purposes of the solicitor.

APPEAL from Stirling J.

John Francis Duncan by his will, dated in February, 1860, gave all the residue of his personal estate to trustees upon trust to permit the same to remain in its actual state of investment at the time of his death, or if necessary to alter and vary the same, and out of the annual income to pay several annuities to certain persons ten of whom were still living. He then provided that in case at any time the annual income of the said trust funds should not be sufficient for the payment of the whole amount of the said annuities . . . . then the trustees should apportion the deficiency between and amongst the said annuitants according to the amount of their respective annuities, and so as that the same should rateably abate accordingly. The testator then directed his trustees in every year after his decease to invest the surplus income, if any, of the trust moneys . . . . whether such surplus should arise from the falling in or determination of any annuity or annuities or otherwise, upon certain securities therein mentioned; "and that, from and after the decease of

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the survivor of the said annuitants," his trustees should convert the trust funds and the accumulations thereof into money, and stand possessed thereof upon certain trusts in favour of five charities, namely, the London Orphan Asylum, the Royal Free Hospital, King's College Hospital, the Free Dispensary, and the National Hospital for the Paralysed and Epileptic.

The testator died in January, 1865; and in April following a suit was instituted by his executors for the administration of his estate. In this suit the estate was administered, considerable sums of money were from time to time paid into court, and divers sums of Consols purchased therewith were carried over to separate accounts in order to provide for the payment of the various annuities.

In the year 1871 it was decided by Wickens V.-C. (1) that according to the true construction of the will of the testator the five charities above mentioned were entitled equally to the whole of the residuary pure personalty and the accumulations during the period of twenty-one years from the death of the testator.

Wickens V.-C. further held, that having regard to the frame of the will, although the annuities were amply secured, he could not at that time order a division of the fund. If, his Lordship said, the residuary legatees had been individuals, he would probably have done so, there being nothing in the Thellusson Act to prevent it: but as the residuary legatees were charities, he considered that it was not the proper course to stop the accumulations, which must accordingly go on till further order.

In the year 1893, the period of twenty-one years from the death of the testator having meanwhile expired, the matter came before Stirling J. on petition, when his Lordship held (2) that the annuities given by the will were payable out of the income, and not out of the capital, of the clear residue of the testator's personal estate, and that the annuitants had no right to resort to the surplus income of any past or future year, or to the accumulations, for the purpose of making up any deficiency; and he made a declaration that the five charities were entitled

(1) L. R. 12 Eq. 559. (2) [1894] 2 Ch. 184.

in equal shares to the whole of the surplus income of the pure personalty and the accumulations thereof, and to such part of the fund in court as represented the same respectively. This order was affirmed on appeal both by the Court of Appeal and the House of Lords. (1)

In pursuance of an order made in June, 1894, certain sums were carried over to the accounts of the ten surviving annuitants. This was done with the consent of nine out of the ten of them, who accepted the provision thus made for their annuities in full satisfaction thereof. The tenth annuitant, who did not consent, was Mrs. Margaret Eleanor Venables. The amount of her annuity was 150*l.*, and the order directed that the sum carried over to the credit of her account should be invested in the purchase of 6000*l.* 2½ per cent. Annuities, the dividends of which annuities were to be paid to her during her life or until further order.

Mrs. Venables, however, stood upon her rights, and declined to accept this provision in satisfaction for her annuity.

The five charities having established their title, subject only to the annuities and the residue being in other respects clear, a petition was now presented by the London Orphan Asylum, who had the conduct of the proceedings in the action, praying for the payment out to the five charities in equal shares of the fund in court other than the sums so set apart to answer the annuities.

This application came before Stirling J. on June 15, 1895, and was not opposed by any of the ten surviving annuitants except Mrs. Venables.

It was conceded that the five charities were entitled to have paid out to them the portion of the fund which had arisen from accumulations of income.

Fischer, Q.C., and *S. Dickinson*, for the London Orphan Asylum, in support of the petition. Mrs. Venables is bound by what has already been done by the Court, and must accept the sum which has been carried over as a complete provision for her annuity. It has long been the practice of the Court to allow

(1) *Sub nom. Wharton* v. *Masterman*, [1895] A. C. 186.

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the residuary legatees to take their own property out of court when once they have made sufficient provision for the payment of the annuities which are charged upon it.

Hastings, Q.C., and *Johnston Edwards*, for Mrs. Venables. The portion of the fund in court which has arisen from accumulations may properly be paid out; but, having regard to the rights of the annuitants under the will of the testator, the whole of the residue ought to be retained in Court; and this seems to have been the view taken by Wickens V.-C. in 1871. This is not the simple ordinary case of a gift of an annuity followed by a gift of residue. The annuities are to be paid out of the income only of the personal estate, and there is no right on the part of any annuitant to resort either to the capital of that estate or to the income of any other year to make up any deficiency. The sum now set apart to answer Mrs. Venables' annuity is only just sufficient to produce at 2*l.* 10*s.* per cent. the exact amount of her annuity. The rate of interest on Consols, which was originally 6 per cent., and then 5 per cent., and long stood at 3 per cent., has recently been reduced; and what security is there that it will not be further reduced? Nothing has occurred to affect Mrs. Venables' rights, and she may live for forty years, for she is only fifty-two. She is entitled to have proper and ample provision made, by means of income, so that the full payment of her annuity during the whole of her life shall be a certainty, whatever reductions may be made in the rate of interest. In fact, as long as she lives, on the true construction of this will, the residuary legatees are not entitled to come and take away any portion of that income, which is the only security she has for her annuity. The distribution of the residue can be effected if all the annuitants can and do consent; but it cannot take place as against an annuitant who objects. The Court, upon the terms of this will, has no jurisdiction to make the order.

Henry Fellows, for the Royal Free Hospital.

Hadley, for King's College Hospital and the Free Dispensary.

Buckley, Q.C., and *T. B. Napier*, for the National Hospital for the Paralysed and Epileptic.

Beale, Q.C., and *T. Ribton*, for the next of kin of the testator.
W. S. Goddard, for the trustees.
Fischer, Q.C., in reply, referred to *In re Parry*. (1)

STIRLING J. (after stating the facts of the case, continued) :— On the present occasion Mrs. Venables appears and opposes any further payment out of court of the corpus of the fund, and it becomes necessary to consider what are her rights. This is not the ordinary case of a gift of an annuity followed by a gift of residue. Mrs. Venables is no doubt an annuitant. She takes 150*l.* a year during her life under the will of the testator; but that is to be paid out of the income of the testator's residuary estate; and it has been declared, by the order which I have read of December 19, 1893, that the annuities given by the will of the testator are payable out of income, and not out of capital, of the clear residue of the personal estate of the testator at the time of his death. Therefore she is an annuitant whose annuity is payable solely out of the income of the estate of the testator, and not out of capital.

Now, what are the rights of an annuitant? In the ordinary case of an annuity given by a will, and followed by a gift of residue, the rights have been ascertained by the practice of the Court. The mode of dealing with such a case is pointed out by North J. in the case of *In re Parry* (1), and, summing up the whole of the law, he says (2): "I think the annuitants are entitled to have such a security as will make it practically certain that the annuities will be fully paid. Of course, the appropriation of part of the assets will not release the rest of the estate. Recourse might still be had, if necessary, to the rest of the estate. But, in my opinion, the proposed appropriation of a mortgage upon the freehold estate, notwithstanding that it is theatrical property, will be an amply sufficient security." Therefore the right of an ordinary annuitant is to have such a security set apart to answer the annuity as will make it practically certain that the annuity will be paid. That is in a case in which the appropriation of part of the assets does not release the rest of the estate. Now here the annuitant has no

(1) 42 Ch. D. 570. (2) 42 Ch. D. 584.

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right to resort to capital. Her annuity is to be paid solely out of income. But it seems to me that the same principle applies, and she would be entitled to have such a portion of the corpus appropriated for the payment of her annuity as would make it practically certain that her annuity would be paid by means of the income of that portion. That seems to me to be her right, and no other.

That being so, what ought to be done in order that it may be made practically certain that her annuity, however long she may live, will be paid out of income? The lady is stated to be fifty-two. The fund which has been set apart by the Court to answer her annuity is 6000*l.* invested in 2*l.* 10*s.* per cent. stock, yielding the exact sum which is required. In 1871 Wickens V.-C. was of opinion that the annuity was amply secured, the sum set apart to answer it being then invested in the ordinary Consols in such a way as to yield the proper amount. But since then events have happened. In 1888 the Legislature created a new stock which was to be applied in paying off the old Consols. That new stock is not redeemable till April 5, 1923; but after that time it is to be redeemable by Parliament on such notice, at such time or times, and in such sum or sums, as Parliament may direct. That is the provision. That is twenty-eight years hence; and it is possible certainly that the annuitant may survive that period, and it is possible (one knows not what may happen) that some alteration may take place after 1923 with respect to what are now called the New Consols. Having regard to the experience which has been acquired since the year 1871, when Wickens V.-C. expressed his opinion on the subject, it seems not unreasonable that there should be some further provision in favour of the annuitant beyond leaving in court the bare sum of 6000*l.*, which, as matters stand, is sufficient. It is offered on behalf of the residuary legatees to leave in court a further sum of 2000*l.*, which will make in the whole 8000*l.*; so that, if the interest is reduced to 2 per cent. by the Legislature hereafter, there will still be sufficient to produce a sum of 160*l.*, that being more than enough to pay the annuity. That seems to me to be a reasonable course.

Then there are one or two points in the argument which, perhaps, I may notice. It was said that the lady was bound, under the circumstances, to accept what had been done by the Court in her favour as a complete provision. It does not seem to me that that is the true construction of the orders. The first order that was made was one of May 25, 1868, by Stuart V.-C., by which certain sums of Consols therein mentioned were to be respectively carried over in trust to the annuity account of the annuitant named, and it was directed "that the interest, to accrue due on the said annuities to be so carried over, be (subject to duty) paid to the said Margaret Eleanor Devonshire, spinster, for her life, or until further order, in satisfaction of the annuity bequeathed to her under the will of the testator."

She was not present on that occasion. She subsequently married, and obtained an order for payment to her of the annuity which was so provided for.

Then it is suggested that by coming in and accepting payment of the fund which was appropriated by the Court in this way she has precluded herself from obtaining anything else. I do not think that is the true view of the order. It is simply an administrative order making provision for payment of the annuities. As North J. observed in the judgment I have read, the appropriation of part of the assets of the testator in that case did not release the rest of the estate. So it seems to me that the appropriation of this particular part of the assets for making provision out of the income of it for the payment of the annuity did not release the rest of the income, and that it left the rights of this particular annuitant unaffected. That, I think, is made perfectly clear by what has been done subsequently in the suit, because similar provision has been made for all the rest of the annuitants; and, as I have already pointed out, in the year 1894 bargains were entered into with the other nine annuitants by which they bound themselves to accept the provision then made in satisfaction of their annuities. After the passing of the Act of 1888, by reason of which the income arising from Consols became insufficient for the payment of the annuities in full, the residuary legatees themselves took out a summons to make up the annuities in full, and they got nine of

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the annuitants to enter into a bargain that the provision then made should be final. Mrs. Venables declined to make any such arrangement, and stood on her rights. She was entitled to do so. It does not seem to me that anything that has happened up to the present time has deprived Mrs. Venables of her right to have the annuity paid out of the income of the fund. It was pointed out that an offer was made to give a charge on the corpus of both the funds in court to answer Mrs. Venables' annuity, and on the reversion which belongs to the residuary legatees of the funds which had been appropriated to answer the other annuities. Mrs. Venables declined that. She says, "My annuity is solely payable out of income; I stand on my strict rights, and I desire that proper provision may be made for the payment of my annuity by means of income." I think she is entitled to do that; I say nothing as to what may happen on the death of any one of the other annuitants. No doubt a question will then arise as to whether the residuary legatees will be entitled to the fund carried over to answer the other annuities, the subject of the bargain I have mentioned; and the same principle, I apprehend, will apply—that is to say, that, Mrs. Venables' annuity being provided for by the appropriation of a sufficient sum to answer it, there may be, in the future, a payment out; but events may occur during the lives of any one of those annuitants, and further experience may shew that the appropriation is insufficient, and the Court will be perfectly free, on the death of any one of the annuitants, to deal with the funds which are standing to the credit of that annuitant, having regard to the rights of Mrs. Venables, the annuitant with whom I have to deal on this occasion, as to the Court may seem right. I do not by any expression of opinion or by anything in the order intend to prejudge what may be proposed to be done on such an occasion.

That being my view of the rights of Mrs. Venables, the annuitant who has not consented to anything, and of the mode in which her rights are to be satisfied, I shall order that 2000*l.* be left in court to the account of the residuary legatees, not to be paid out without notice to the annuitant; and they, in accordance with the order of the House of Lords, will, in the

meantime until further order, receive the income arising from that fund. All the rest of the funds in court standing to the credit of the residuary legatees may now, I think, be safely paid to them, just as Wickens V.-C. directed the impure personalty to be paid over to the Crown in the year 1871.

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Mrs. Venables appealed. The appeal came on for hearing on December 9, 1895.

C. A.

Hastings, Q.C., and *Johnston Edwards*, for the appellant, (after making use of arguments similar to those they had addressed to the Court below). In this will there is a charge of the several annuities upon the income of the residuary estate, coupled (in effect) with a direction that such estate is not to be paid over to the residuary legatees until after the death of the survivor of the annuitants.

[RIGBY L.J. In *Saunders* v. *Vautier* (1) the Court assumed a jurisdiction which negatived the words of the will.]

That was a decision as to income, and it has never applied to a question of corpus. The learned judge in the Court below relied in his judgment on *In re Parry*. (2) But that was a totally different kind of case, in which the annuitants had a charge upon the capital of the estate; and North J. considered that, as the estate had been cleared, the annuities would be sufficiently secured by a proposed mortgage of ample property. There is no authority which lays down that in such a case as this the Court can direct the distribution of residue after setting aside enough to answer the annuities.

[RIGBY L.J. Has it not long been the practice of the Court to distribute the estate after providing for the annuities? See *King* v. *Malcott*. (3)]

Not against the opposition of the annuitant.

[*Fischer, Q.C.* The practice was established by Lord Talbot in 1734 in the case of *Slanning* v. *Style*. (4)]

That case is not applicable here. Distribution may no doubt take place with consent, but the Court cannot diminish the

(1) Cr. & Ph. 240.
(2) 42 Ch. D. 570.
(3) 9 Hare, 692, 697.
(4) 3 P. Wms. 334, 336.

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corpus of the security if the annuitant objects: *Weatherall* v. *Thornburgh*. (1)

Fischer, Q.C., and *S. Dickinson*, for the London Orphan Asylum. In addition to the 6000*l.* originally set apart, a further sum of 2000*l.* had been retained in court, and is not to be dealt with without notice to Mrs. Venables; so that she will have enough to provide for an annuity of 160*l.* even if the rate of interest should hereafter be reduced to 2 per cent. Her annuity is thus amply provided for; all the other annuitants are satisfied, and her opposition and this appeal are groundless. An annuitant is, after all, only a legatee of divers contingent sums of money accruing de die in diem, and Mrs. Venables is in no better position than any ordinary annuitant. According to the argument of the appellant, no part of a residue of 100,000*l.* could be paid out to the residuary legatee if an annuitant of 100*l.* a year objected. Ever since 1734 it has been the uniform practice of the Court to give to the residuary legatees what the testator intended them to have as soon as the annuities are released, or sufficient provision has been made for them: *King* v. *Malcott* (2); *Prendergast* v. *Lushington* (3); *May* v. *Bennett* (4); *Booth* v. *Coulton* (5); *Boyd* v. *Buckle* (6); *In re Parry* (7); *Simmons* v. *Bolland*. (8)

Henry Fellows, for the Royal Free Hospital.

Hadley, for King's College Hospital and the Free Dispensary.

Buckley, Q.C., and *T. B. Napier*, for the National Hospital for the Paralysed and Epileptic.

Johnston Edwards, in reply.

Cur. adv. vult.

1895. Dec. 16. The judgment of the Court (Lindley, A. L. Smith and Rigby L.JJ.) was delivered by

LINDLEY L.J. In this case there is an appeal, nominally in the name of Mrs. Venables, against an order made by Stirling J. directing certain funds to be paid over to certain charities

(1) 8 Ch. D. 261, 270.
(2) 9 Hare, 692, 697.
(3) 5 Hare, 171; S.C. on appeal, H. L. C. 195, 222.
(4) 1 Russ. 370.
(5) L. R. 5 Ch. 684.
(6) 10 Sim. 595.
(7) 42 Ch. D. 570.
(8) 3 Mer. 547.

which are residuary legatees, although there is one annuity charged upon the residuary estate and still payable to Mrs. Venables. Under orders, which I need not refer to, a sum of 8000*l.* in Consols has been set apart to answer Mrs. Venables' annuity, the amount of which is 150*l.* a year. In the judgment of Stirling J. that was an ample sum to set apart for the purpose; and the appellant's counsel did not seriously contend the contrary. It is obvious, upon consideration, having regard to the age of the lady and the amount of the annuity, that 8000*l.* is quite ample. But counsel for the appellant argued that inasmuch as Mrs. Venables' annuity was charged upon the whole residuary estate Stirling J. had no jurisdiction to order the residuary estate to be divided; and that the will which gave her the annuity, and gave the charities the residuary estate, is so worded that the residue is not divisible until after payment of the annuity. Counsel's point was that the payment in respect of the annuity will not come to an end until Mrs. Venables' death, and that upon the terms of the will there is no jurisdiction in the Court to order the residuary estate to be distributed until after her death. Now, according to the strict language of the will, that no doubt is so. But what is the meaning of a will which charges a residuary estate with a legacy or several legacies of this kind, and directs that upon the death of the survivor of the annuitants the residue is to be divided? As between the annuitants on the one hand and the residuary legatees upon the other, it is a gift of the residue subject to the payment of the annuities. And if the annuities are released, or ample provision is made for the payment of them, it has been the invariable practice of the Court to let the residuary legatees have what is theirs, subject to the payment of the annuities.

I confess that it took me by surprise to be told that there was no jurisdiction to make any such order as that which is here asked for, and that the Court had never done such a thing in the face of opposition. That the Court has been in the habit of doing it ever since Lord Talbot's time is obvious from the cases; and, speaking from my own recollection (and my brother Rigby confirms me), it has been done scores of times.

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But we are not prepared to say that we recollect a case where it was done in spite of opposition.

Mr. Fischer referred us to a great many authorities which supported that view of the practice of the Court, and, in addition to those decisions, there are one or two more. There is, more particularly, the case of *Fryer* v. *Buttar* (1), which might have been referred to, and which I will mention, without going through it. In that case there was considerable opposition, although not actually to the distribution of the final residue. The view taken by Stirling J. in the present case is the common sense view; and it is, as I have said already, supported by the uniform practice of the Court, which is to let the residuary legatees have what is theirs, subject to the setting aside of a sufficient sum for the payment of the annuities. Of course, if in some unforeseen event it should become necessary for the annuitant to have recourse to the capital so set apart, she would be entitled to do so. But it is inconceivable that she will not be paid her annuity in full in any case, except the insolvency of the country—and that is a contingency which the Court never contemplates. So far there is no difficulty, and it was not because any of us felt a difficulty that we did not give judgment when the argument was concluded. But there was a question which occurred to us about the costs of this appeal which required care.

The appeal will be dismissed with costs.

His Lordship then intimated that the Court was ready to hear Mr. Hood Barrs, the solicitor of the appellant, upon the question of costs.

Hastings, *Q.C.*, for the appellant. Before your Lordships hear Mr. Hood Barrs, I desire to call the attention of the Court to the fact that the five residuary legatees appear by four different sets of counsel, who are altogether six in number. In the first instance, the appellant only served the charity which had the conduct of the action; but the advisers of that charity took the objection that the other residuary legatees would not

(1) 8 Sim. 442.

be before the Court, and upon their request we served the others.

Fischer, Q.C., for the London Orphan Asylum. The orders of the Court (Order LVIII., r. 2) require that "notice of appeal shall be served upon all parties directly affected by the appeal"; and we, having been ourselves served, suggested that the other four charities who are directly affected by it should be served also. Whether they should or should not appear, and, if they did appear, whether or not they should be represented by the same counsel as the London Orphan Asylum, was a matter for their own consideration.

[LINDLEY L.J. It was right to give them notice; but the question is at whose expense they appear.]

Buckley, Q.C., for the Hospital for the Paralysed and Epileptic. This is a question of general importance. The appellant has served several respondents, and the same principles apply as in a case where a plaintiff sues several defendants. Each defendant is entitled to appear and defend himself by the solicitor and counsel whom he chooses to instruct. The Court cannot inquire into his reasons for so doing; and the plaintiff cannot say to any particular defendant, "You ought to have employed your co-defendant's solicitor." By Order XVI., r. 9, "Where there are numerous persons having the same interest in one cause or matter," one or more of such persons may sue or be sued, or may be authorized by the Court to defend on behalf of all persons interested; and, according to *Wood* v. *M'Carthy* (1), an order may be made under that rule authorizing a person to defend on behalf of all persons interested even against his own opposition. But no such application was made here. Then, if a classification order is made, it is competent for any of the parties to raise the question as to who should be the solicitor to act for all; and under Order LV., r. 40, in certain cases, where the parties can be classified and cannot agree upon the solicitor to represent them, the Court may nominate one; and provision is made for the contingency of one of the class refusing to employ the nominated solicitor.

We did not ask to be served. We are brought before the

(1) [1893] 1 Q. B. 775.

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Court as respondents in the ordinary way. The appellant cannot dictate to us what solicitor we are to employ; and, the appeal having failed, we are entitled to our costs according to the ordinary rule that every plaintiff or appellant who does not make out a case for a representation order goes on at his own peril as to costs. If this were not so, then in every case between co-defendants or co-respondents the Court must inquire whether under the circumstances any one or more of them ought to have confidence in the solicitor of the other. It is for the Court to consider whether it is not the practice that in such a case as this respondents are entitled to appear separately and have their costs.

Henry Fellows, for the Royal Free Hospital, and

Hadley, for King's College Hospital and the Free Dispensary, were not heard upon the question of costs.

Hastings, Q.C., in reply.

LINDLEY L.J. In these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs; and the Court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there really was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel in the same interest can be heard here. I think it would be oppressive to allow more than one set of costs. What we are prepared to do is to exercise our discretion on this occasion, and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the appellant, and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like; but this is not a case where it was necessary for four sets of counsel to be instructed in order to protect the rights of the residuary legatees.

A. L. SMITH L.J. I entirely agree.

RIGBY L.J. I also agree.

LINDLEY L.J., then addressing Mr. Hood Barrs, said:—It appeared to us, when we understood this case, that this appeal

could not have been bonâ fide brought by or in the interest of Mrs. Venables; and we took upon ourselves the responsibility of communicating with the Official Solicitor, and directing him to see Mrs. Venables to ascertain whether this appeal was brought by her and in her interest, she understanding that there was amply sufficient in Court to provide for her annuity. The Official Solicitor has given us a letter, purporting to be signed by you, which is to this effect: that it is your appeal, that you intend fighting the case to the House of Lords, and that you are to have the benefit of the appeal, if there is any benefit. Under those circumstances, it is for you to shew us why we should not make an order that you should pay the costs.

Mr. *Hood Barrs* then addressed the Court.

LINDLEY L.J. We have now to consider whether this is a case in which an order ought to be made against the appellant's solicitor in person to indemnify his client against the costs of this appeal. We know now from Mr. Hood Barrs' own statement the whole history of this case, and what this appeal is really for; and it is perfectly obvious that our suspicions were well founded, and that this appeal cannot be fairly or properly regarded as an appeal brought in the interests of Mrs. Venables, but that the object of it is to compel the charities to come to some terms with Mr. Hood Barrs, especially with respect to certain costs, as to some of which he has given his own personal guarantee. That explains the letter which he admits having written to Mrs. Venables, passages from which I will read. He says: "With regard to the appeal about which I wrote you, as I have said you will incur no liability whatever. Whatever liability there is will be with me. I hope ultimately to get a settlement of the appeal which will be beneficial to me"—that is, in effect, "I will take the burden of the appeal on myself, and at the same time any benefit that may result from it." That expresses in a few words the real truth; and it is perfectly obvious that Mrs. Venables, although she has so far authorized and approved of this appeal as to render herself responsible for the costs, was, as between her and her solicitor, a mere puppet

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in his hands, and that this appeal is brought by him for his own purposes, and not in her interest at all. Now Mr. Hood Barrs has thought proper to cast aspersions on the conduct of the Official Solicitor. All I can say is that we are responsible for sending him to Mrs. Venables. We were convinced, or, at all events, strongly of opinion, that this appeal was not brought by her in her interest—in other words, we did not believe that the real object of this appeal was its apparent object, namely, to get for her a better security for her annuity. Having that opinion, it was our duty to take care that a suitor of the Court was not let in for considerable costs for a purpose with which she had really nothing whatever to do. I think not only were we justified, but we should have failed in our duty if, having that view, we did not investigate the matter by sending the Official Solicitor to inform us more about it. The Official Solicitor goes as the officer of the Court; he is not a solicitor for the client—nothing of the sort. He has performed his duty in a way that has given us at least perfect satisfaction; and we should be failing in our duty if we did not apply Order LXV., r. 11, to this case (1); for if there ever was a case to which that order ought to be applied this is one.

The charge against Mr. Hood Barrs (which he has proved up to the hilt by his own statement) is that this appeal is not brought for the benefit of his client, but is brought for the ulterior purpose of benefiting himself in this sense—to compel these charities, if he can, to come to some arrangement with him, which they are not in the least bound to do, and which he has no right to impose. It is very nearly, if not quite, justifiable to say that it is a blackmailing appeal.

(1) "If in any case it shall appear to the Court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to shew cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require."

A. L. SMITH L.J. I am entirely of the same opinion.

The question which the Court has to determine now is whether it does appear to the Court that costs have been "improperly or without any reasonable cause incurred"; because, if the Court comes to that opinion, power is given to the Court under Order LXV., r. 11, to call upon the solicitor of the client to shew cause why the costs should not be disallowed, or why he should not pay the costs which have been incurred by the client. I wish shortly to state how the matter appears to me. The testator made a will, and controversy arose as to the construction of that will. My brother Stirling J. put a construction upon it. This Court afterwards put the same construction upon it; and the House of Lords has held that the construction put upon it by my brother Stirling and this Court was right. I do not for a moment say that that litigation, which as I understand was undertaken on behalf of the next of kin, who were the appellants all through in this Court and in the House of Lords, was not a proper litigation for Mr. Hood Barrs to undertake. I do not say that in any shape or way up to the judgment in the House of Lords, which was given in March, 1895, any complaint can be made of Mr. Hood Barrs in the matter. What we have to determine is as to what took place after March, 1895, when the judgment of the House of Lords was given. Now what happened? The judgment of the House of Lords affirmed that certain charities, five in number, were entitled to the corpus of the property—I am putting it shortly—subject to certain annuities, and the House of Lords gave judgment for the respondent with costs against the appellants there, who were Mr. Hood Barrs' clients. It seems to me that Mr. Hood Barrs, after that judgment had been given against his clients, did all he could to get these charities to forego their costs. That seems to me to be all right. But he could not get them to agree to that; and they were within their rights in saying, "We will not forego our costs." Then what happened? The charities wanted to get the property to which the House of Lords had said they were entitled. That property was invested at that time in Consols in court in the administration of the testator's estate. What the charities did was this. They took out a

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summons before my brother Stirling to get an order that the corpus should be paid out to them in the shares to which they had been adjudged entitled under the judgment of the House of Lords, but of course subject (I do not forget what Mr. Hood Barrs said about making provision for the annuities) to such part of the corpus being set aside so as to fully secure the annuitants having a charge upon the corpus. What did my brother Stirling do? He took into consideration the circumstances as regards Mrs. Venables, and no doubt as regards the other annuitants—none of whom appeal against Stirling J.'s order except Mrs. Venables—and he said, "If 8000*l.* is set apart and kept in court for the purpose of satisfying your annuity, I am perfectly certain you will have your annuity of 150*l.* a year as long as you live." I myself am perfectly satisfied that my brother Stirling was right in that, and nobody can hear what I am saying without being satisfied that the order of my brother Stirling was a just order to make as between the annuitants on the one part, and the charities who were entitled to the residue of the corpus on the other. But now comes the difficulty with regard to Mr. Hood Barrs. He could not get the charities, as I have before said, to agree to forego their costs; so he went to Mrs. Venables, who is a lady certainly not in affluent circumstances, and got her name for the purpose of appealing against that order of Stirling J.'s; and it certainly did appear to me, when Mr. Graham Hastings was arguing this case on behalf of the appellant, that it was as senseless an appeal as ever I heard, and one which nobody could have brought unless he or she had been ill advised, or was perverse or obstinate, and that in truth it was not really Mrs. Venables' appeal. Now what was the Court to do? It struck me as cruel—and no other word will properly describe it—that in dismissing the appeal that we should have to make this unfortunate lady pay the costs. She has only a small annuity of 150*l.* a year, and the costs of the appeal could not be otherwise than heavy. What were we to do? We have an officer of this Court who is called the Official Solicitor. In my judgment, that officer is appointed Official Solicitor to the Court in order that a judge, when he sees before him certain matters which he wants in-

vestigated, and as regards the absolute accuracy of which counsel is not instructed, and has no knowledge whatever, may communicate with that official in order that the judge may be informed as to where the real truth of the case lies. In this case, and I say it emphatically, although Mr. Hood Barrs chooses to apply the term "dirty work" to Mr. Winterbotham, that term ought not to be applied, because Mr. Winterbotham has faithfully carried out our orders—which orders, considering the position in which we were placed by the acts of Mr. Hood Barrs, we were bound to give. Then we find out it was not Mrs. Venables' appeal. It is all very well to say that she had given instructions to Mr. Hood Barrs; but what interest had Mrs. Venables in appealing to this Court? She had her 8000*l.* Consols set apart for her for the rest of her life, which sum was more than sufficient to pay, whatever might happen, the annuity of 150*l.* a year. Now Mr. Hood Barrs comes and tells us—and I have no doubt accurately—the attempts he had made to settle after he was defeated in the House of Lords. He could not get a settlement; and, as has been pointed out by my brother Lindley, this appeal is not brought in the interest of Mrs. Venables at all. It is perfectly immaterial to her, except as regards costs, which way it went; but it was brought for the purpose of coercing, if Mr. Hood Barrs could, these charities to come to his terms, and as in his letter of November 9, 1895, he says, "I hope ultimately to get a settlement of the appeal which will be a benefit to me." If there ever was a case in which this order should be applied it appears to me to be this one; and I think the order which my brother Lindley has sketched out ought to be made.

RIGBY L.J. I will assume, for the purposes of my judgment in this case, that the conduct of Mr. Hood Barrs down to the time when the order was made for setting aside a sum to provide for this lady's annuity was not only justifiable, but, from the point of view of his client, altogether beneficial to her, and that, in every respect, down to that period, he was free from blame. The order made was that 8000*l.* 2½ per cent. Annuities should be appropriated to meet an annuity of 150*l.* a year

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payable to a widow during the term of her life. It was not mentioned in the order that in the improbable—one might almost say the impossible—case of the annuity ever being larger than the income produced by that 8000*l.*, that she could go upon the 8000*l.*; but at any rate it was shewn us in argument that the charities offered to have that made clear upon the face of the order, and that offer, for reasons which we now perfectly comprehend, was declined. I say this because from Mr. Hood Barrs' own statement it became abundantly clear that he did not think that the 8000*l.* was an insufficient security. He tells us, himself apparently unconscious of the conclusion that would be drawn from what he said, that he was willing after the order was made to come to terms which would release 2000*l.* out of the 8000*l.*, leaving 6000*l.* only, stipulating that he should be allowed, or, rather, his client should be allowed, to resort to the capital of the remaining 6000*l.*—terms less advantageous to his client, Mrs. Venables, than those which I believe were effectuated by the order, but which, at any rate (which for this purpose is more important) were offered by the other side at that time, and declined. So that I think it would be absurd to suppose that Mr. Hood Barrs imagined that Mrs. Venables' interest was in any way concerned in this appeal. But it has now been made clear that Mr. Hood Barrs had a direct personal interest in the matter, or, at any rate, had grounds for believing that if he could get this order, which his client's interest in no way required him to get, reversed on this appeal, his own pocket would be the better for it, because he could impose terms upon the charities which would relieve him, at any rate, from the personal undertaking he had entered into to pay certain costs which I need not specifically refer to.

That being the position of things, and that being, as we have from Mr. Hood Barrs' own lips, his own appreciation of the case, namely, that Mrs. Venables was sufficiently secured, and that she had no interest, he approached her, and suggested—and a more improper suggestion I venture to say was never made—that she should lend her name to him (coming here to the Court as though she were the bonâ fide appellant) on the terms that he should indemnify her against costs, and that he per-

sonally should take the benefit of the appeal. It startles one to find that a solicitor, an officer of this Court, can come into court and openly avow a transaction of that kind and yet apparently remain unconscious of the absolute impropriety of it. It appears to me that that unconsciousness, if it were not assumed, is a very grave feature of the case.

Mr. Hood Barrs permitted himself to make observations from a high standpoint, as that of a respectable solicitor who had a right to throw aspersions on others who were doing their duty. I wish it to be known that in my judgment, at any rate, it is not the part of a respectable solicitor to induce clients to lend their names for appeals in which they have no interest at all, in order that the solicitor himself may gain his own private ends. I look upon such an agreement as an abuse of the practice of the Court. Mr. Hood Barrs thought it right to complain of the fact that he was not approached for information. I have formed my own judgment as to the sort of information we should have got from him if he had been allowed to be the go-between between the Court and Mrs. Venables. I feel satisfied that we should not have arrived at the true state of things; and I feel certain we should have been altogether disregarding our duty if, in a case of this kind, we had not instructed our officer to find out the facts, which otherwise I feel convinced we never should have known.

I will only say I think the Official Solicitor, in doing what he did, in no way exceeded the instructions that were given to him by us, and that he did what was perfectly right and proper, and I protest against the notion that this Court is to be bound by any idea of etiquette, or by any theories as to what is respectable between solicitors—to shut its eyes, or, rather, to shut the door to information which may be obtained, and which has been obtained, as in this case, and which would never have been obtained if we had not taken the course we did. I consider that if ever there was a case of costs being occasioned improperly this is that case. I concur in the judgment which Lindley L.J. has mentioned, that this is a case in which Mr. Hood Barrs can recover nothing from his client, and that he must repay to her any costs which she is liable to pay under

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the order of the Court already made. The fact that he indemnified her is one of the charges against him. It is no merit that he did it. It was absolutely wrong to do it. After this I hope no solicitor will ever come and say, I intended what was right; I used the process of the Court to bring about what I thought right, and I did it by deceiving the Court in the first instance into a belief that it was not I, acting in my own interest, but an innocent client who was bringing an appeal which the Court has decided to be not only wrong, but altogether without precedent.

The appeal will be dismissed with one set of costs, to be paid by the appellant and to be repaid to her by Mr. Hood Barrs personally, and he is not to be entitled to any costs from his client.

Solicitors: *Hood Barrs & Co.; Winter & Co.; Hyde, Tandy & Co.; Bower, Cotton & Bower; Gadsden & Treherne.*

W. W. K.

C. A. 1895 KEKEWICH J. *July* 17. C. A. *Nov.* 21, 22, 25. *Dec.* 18.

In re DALLMEYER. DALLMEYER *v.* DALLMEYER.

[1894 D. 1467.]

Will—Option for Sons successively to take Testator's Business—Son taking to be debited with Value—Advancement—Interest—Accumulation of Income—Division of Residue and Accumulations—Equality—Advancement of part of Residuary Share.

A testator by his will gave each of his sons in succession, according to seniority, the option of succeeding to his business, and declared that the son electing to do so should be debited with the value thereof in the division of his residuary estate, and if the value should exceed the amount of such son's expectant share therein at the time the option was declared, he should refund the excess to the testator's residuary estate. Then, after giving certain legacies to his other children, sons at twenty-five, and daughters at twenty-one or marriage, which were to carry interest from his death applicable for maintenance, the testator gave his residuary estate upon trusts for sale, conversion, and investment and payment of certain annuities, and directed the trustees to accumulate the surplus income at compound interest for twenty-one years from his death, if any child of his should so long live and be under twenty-one, and on the attainment of

twenty-one by his youngest living child (which was to be the period of distribution) to hold the trust fund in trust for his children then living as tenants in common. The will also empowered the trustees, at any time before the period of distribution, to make advances out of the capital of the trust premises in favour of any of his sons, the sums so advanced to be taken in part satisfaction of the shares in the trust premises to which the sons advanced should become entitled.

The testator died in 1883, leaving three sons and two daughters. The eldest son in 1884 elected to succeed to the business, the value of which (15,000*l.*) did not at the time exceed the amount of his expectant share. The youngest child attained twenty-one in 1894; and meanwhile the second son had, under the powers of advancement, received sums amounting to 8200*l.*:—

Held, by the Court, that in debiting the eldest son with the value of the business taken by him, he ought not to be debited with interest thereon from the time he took it, but only from the period of distribution:

Held, also, by Lord Herschell and A. L. Smith L.J. (Rigby L.J. dissentiente), that as to the sums advanced to the second son no interest ought to be charged thereon prior to the period of distribution.

The principles applicable with reference to advancement commented on and explained.

The decision of Kekewich J. affirmed.

APPEAL from Kekewich J.

John Henry Dallmeyer, the testator in this cause, was at the time of his death carrying on business as an optician at 19, Bloomsbury Street, and was seised of a mansion and grounds called "Sunnyfield" at Hampstead, and possessed of personal estate of considerable value.

By his will, which was dated February 18, 1880, and was divided into numbered clauses, after certain specific bequests, the testator by clause 3 declared that his sons Thomas, Sidney, and Owen should have the option, in succession according to seniority, after attaining twenty-one years, of succeeding to his business of optician, such option to be declared in writing within such time as his executors and trustees should in writing appoint; and in the same clause 3 was the declaration following: "And I declare that, immediately on any son of mine electing to succeed to such business, the whole of the said business and the capital thereof, and the stock-in-trade, machinery, plant, and effects employed therein, and the benefit of all contracts subsisting, and all book-debts due to me in respect thereof at the time of my decease, and the lease of

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the messuages, offices, and buildings situate at No. 19, Bloomsbury Street aforesaid, in which the said business is carried on, and the office and other furniture and effects used for the purposes thereof, shall (subject to and charged with the contingent payment thereout hereinafter mentioned) belong to him, and he shall be debited with the value thereof (estimated in such manner as my trustees shall think fit) in the division of my residuary estate; and, in case such value shall exceed the total amount of the expectant share of such son in my residuary estate (estimated in manner aforesaid) at the time such option is declared, he shall refund such excess to my residuary estate, by instalments or otherwise, in such manner and at such time or times as my trustees shall determine."

By clause 5 the testator bequeathed certain pecuniary legacies, including the following: "To my son who shall elect to succeed to my said business the sum of 500*l.*, to be paid to him as soon as may be after he shall have declared such election and commenced to carry on my said business"; and "unto and equally between such of my children (except the son who shall elect to succeed to my said business) as being sons attain the age of twenty-five years, or being daughters attain the age of twenty-one years or marry under that age, the sum of 4000*l.*" Then the testator proceeded: "And I direct that such legacy shall carry interest at 5 per cent. per annum from my decease, to be applied by my trustees at discretion in or towards their respective maintenance and education during minority; and as to sons in or towards their maintenance, education, or benefit until they shall attain the age of twenty-five years." And by clause 6 the testator authorized his trustees, at any time after any of his said sons should have attained the age of twenty-one years, "to advance either the whole or any part of his then expectant share in the said legacy of 4000*l.* in or towards establishing him in business."

By clause 7 the testator devised and bequeathed all his real and personal estate, not otherwise disposed of by his will or any codicil thereto, to his wife and two other trustees upon trusts for sale and conversion, and declared that his sons Thomas, Sidney, and Owen should have the option in succession of

purchasing his mansion and grounds called Sunnyfield, at a price calculated at three-fourths of the amount of a valuation to be made as therein directed.

By clause 8 the testator directed that his trustees should, out of the moneys to arise from the sale and conversion of, or forming part of his residuary estate, pay his funeral and testamentary expenses and debts and legacies, and the legacy duty therein mentioned, and should invest the residue of such moneys in the investments therein mentioned; and (by clause 9) that they should out of the income of the said trust premises pay to his wife whilst his widow an annuity of 600*l.*, reducible to 100*l.* on her marrying again.

Clauses 11, 12, and 13 were as follows:—

Clause 11: "My trustees may at their discretion at any time or times before the period of distribution hereinafter mentioned apply, out of the surplus income of the said trust premises, in or towards the maintenance or education of any son or daughter of mine, such yearly sums and in such manner as my trustees shall think fit, all sums so advanced for the maintenance or education of any son or daughter of mine who shall have attained the age of twenty-one years to be taken in part satisfaction of the share to which he or she or his or her issue may respectively become entitled of the said trust premises."

Clause 12: "My trustees shall invest in their names the surplus income of my said trust premises after satisfying the said annuities, the discretionary power next hereinbefore contained, and all expenses incident to the execution of the trusts of this my will, upon such securities as are hereinbefore specified, with the like power of transposition, and by similar investments shall accumulate at compound interest the resulting income for the term of twenty-one years from my decease, if any child of mine shall so long live and be under the age of twenty-one years; and shall upon the determination of the said term, upon the attainment of the age of twenty-one years by my youngest living child (which determination is hereinafter referred to as the period of distribution), stand possessed of the said trust premises with the accumulations thereof (subject to such of the trusts hereinbefore contained as shall then be subsisting) in trust for

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my child or children living at the period of distribution, and the issue then living of any child or children dying before such period, such objects to take as tenants in common according to the stocks, and not to the number of individuals composing the class, the shares of children to be paid immediately, and the shares of other issue, being males, at the age of twenty-one years, or being females at that age or marriage."

Clause 13: "My trustees at any time or times before the period of distribution may apply out of the capital of the said trust premises any sum or sums of money not exceeding in the whole one-half of the capital share in or towards the establishment of each or any son of mine in any profession or business to be approved of by my trustees, or his advancement in the world in any other manner which may appear to them expedient, the sum so advanced to be taken in part satisfaction of the shares to which my said sons or their issue may respectively become entitled of the said trust premises."

The testator died on December 30, 1883, and his will, with a codicil thereto not material to the questions now to be determined by the Court, was proved by his widow on December 15, 1884.

The testator left five children, namely, the three sons, Thomas, Sidney, and Owen, respectively mentioned in his will, and two daughters. Thomas, the eldest son, was born in 1859, and therefore attained the age of twenty-one in his father's lifetime.

The youngest child, a daughter, was born in 1873, was about ten years old when her father died, and attained the age of twenty-one in 1894. Thereupon the term of twenty-one years during which accumulations were directed to be made came to an end, and the residuary trust premises, comprising a considerable sum arising from accumulations of income, became distributable.

In 1884 Thomas, the eldest son, under the provisions of clause 3 of the will, elected to succeed to the testator's business; and the value of the business and assets was ascertained by the trustees at a sum of about 15,000*l.*, which did not exceed the total amount of the expectant share of Thomas in the residuary estate at the time when the option to succeed was declared.

Sidney, the second son, had received in three separate sums 8200*l.* out of capital under the power of advancement contained in clause 13, besides advances out of income under the power of advancement for maintenance contained in clause 11.

The three younger children had received no advances out of capital; but they, or some of them, had received, before and since attaining twenty-one, certain sums out of income, under the power of advancement for maintenance contained in clause 11.

In 1894, the testator's youngest child then having attained twenty-one, this action was brought, by originating summons, by the trustees against the testator's five children, for the determination of (amongst others) the following questions: (1.) whether, on the division of the estate, Thomas should be charged with interest, and at what rate, on the value of the testator's business, or any part of it; (2.) whether Sidney should be charged with interest, and at what rate, on his advances, or any of them.

Rowden, for the plaintiffs.

Bramwell Davis, Q.C., and *P. F. Wheeler*, for the defendant Thomas Dallmeyer, contended that he was not chargeable with interest on the value of the testator's business.

Warrington, Q.C., and *Horsbrugh*, for the defendant Sidney Dallmeyer, contended that his advances were not chargeable with interest.

Renshaw, Q.C., and *Sargant*, for the defendants, the three younger children, contended that interest was chargeable against both the other defendants in order to produce equality in the division of the estate. [They cited *In re Rees* (1) and *Field* v. *Seward*. (2)]

KEKEWICH J. I am not aware of any case in which a general principle has been laid down respecting interest payable on moneys directed or permitted to be advanced to children without any direction, expressed or implied, that they are to carry interest. Probably the reason for the absence of any such case is that, since in a large proportion of cases there is a tenant for life, that particular question does not often arise. The

(1) 17 Ch. D. 701. (2) 5 Ch. D. 538.

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ordinary power of advancement, of course, when properly framed is, during the life of the tenant for life, exercisable with his or her consent, and he or she does not consent, except on the terms of being paid interest, unless he or she is content to waive the interest.

I am not prepared to lay down a general rule; but, if it is to be said to be a general rule that interest is always chargeable notwithstanding there is no express or implied direction to charge it, you offend against the principle that you must not introduce words into a will or make a new will for a testator. It is so easy for a testator to say that the sum advanced shall be charged against, for instance, "my son's share, with interest," specifying the rate, that if he does not say it, I fail to see why the Court should assume that he intends to say it. Of course, what he intends may be necessarily implied just as much as expressed; and if you find a definite expression that all the children shall take equally, then, whether you have a hotchpot clause or not—as is explained by Sir George Jessel in the case of *In re Rees* (1)—in order to give effect to that equality you must charge interest on advances; otherwise one child gets an advance, say, of 1000*l.*, without paying anything on it, and the estate is robbed of the 1000*l.* and the income of it until the time for division comes, and another child who is unadvanced loses what the advanced child takes. In order to give effect to that equality you must charge interest.

But what does equality mean? Does equality mean the intention that each child is to have the same benefit under the will as every other child—the intention that when the time comes for winding up the estate and taking the accounts each son and each daughter shall have exactly the same sum calculated out as an accountant would calculate it out, principal and interest? That is not my notion of the ordinary provision for equality. Of course I am not talking of the variation, which may be very well introduced, of a son taking double as much as a daughter, the daughters taking equally between themselves: that is only another form of equality, although it is not logical equality. The same rules would apply.

(1) 17 Ch. D. 701.

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But is there not a different sort of equality, and does not this testator aim at that, namely, that when those who require to be advanced have been advanced—when those to whom the testator thinks it right to give an option of purchase or of appropriation, as of a choice of articles, or something of that kind—when all that has been exhausted—when you come to divide the residue, then, that that residue shall be divided equally between the parties? The result of an equal division of that kind may very well be to give the children unequal portions. An eldest son may have purchased the estate to his great advantage, and not have paid interest on it, bringing that simply into the common pot, and having in that way some advantage over his brothers and sisters, although, on dividing what is to be divided when the time for division comes, there may be perfect equality. Now, as it seems to me, that is the equality this testator has aimed at. He has provided that when the time comes there is to be a division among the children in equal shares, and he has not said that necessarily each child shall find that on taking the proper accounts they have all equal benefits under the will. If that is the proper view of the general scope of this will, it fits in well enough with the directions given with reference to these three cases respectively in which interest is sought to be charged. As regards Thomas, who takes the business, he is to bring it in with his share—to take it in part satisfaction of his share. As regards any child who is advanced, clause 13 does the same thing. The sum advanced is to be taken in part satisfaction of the share; and the same as regards those who have maintenance after they attain twenty-one—the maintenance is to be taken in part satisfaction of the share; that is to say, supposing, when the period for division comes, there are five children, and there is 5000*l.*, each will receive 1000*l.* Now, has the eldest son, Thomas, received something in part satisfaction of his share? If he has, it comes into the account, and the result of course is that what is divisible amongst the other children is thereby increased; but that fits in with equality of division here without charging him with interest in the meantime. I think the true principle is to adhere to the language of the will, and not, in construing the

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will, to introduce more rigid rules than are necessary. It seems to me that unless you have equality, either with or without a hotchpot clause—the equality which the Master of the Rolls pointed out in *In re Rees* (1), and which is also the foundation of *Field* v. *Seward* (2), before Bacon V.C.—I see no reason why interest should be charged. Certainly, in so deciding, I am doing no violence to the language of the will; on the other hand, I am by no means sure that to charge interest would not be doing violence to the language. There must, therefore, be a declaration accordingly.

[His Lordship accordingly made an order declaring that, on dividing the estate, interest was not chargeable (1.) in respect of the value of the testator's business, nor (2.) on the advances to the defendant Sidney, or any of them.]

G. I. F. C.

The defendants, the three younger children, appealed from that order.

C. A. The appeal was heard on November 21, 22, and 25, 1895.

Renshaw, *Q.C.*, and *Sargant*, for the three younger children. We say (1.) that the son who elected to take the business ought to pay interest on the value thereof from the time when he exercised his option down to the period of the distribution of the trust premises; and (2.) that the son who received advances to the amount of 8200*l.* ought to pay interest thereon from the dates when such advances were respectively made down to the period of distribution. As regards the first point, the son was to be "debited" with the value, and such an expression would authorize a charge of interest. Besides, if the value of his expectant share exceeded the price of the business, he was to pay the difference; and, therefore, even if he was not to pay interest directly, he was liable to pay it indirectly by the expectant share being discounted.

As regards the second point, the intention of the testator was to place all the children upon an equality. The testator has done what is equivalent to directing the advances to be brought into hotchpot; and in such a case interest will be charged upon

(1) 17 Ch. D. 701. (2) 5 Ch. D. 538.

the advances where the charging of interest is required to put the estate—or rather the unadvanced children—in the same position as if no advances had been made: *In re Rees.* (1) It is true that in that case interest was charged from the death of the testator's widow only; but the reason of that was that the widow took a life interest in the trust estate, and the children could only get the income of the capital after her death; the unadvanced children, therefore, lost nothing by interest not being charged on advances during her lifetime. But in this case no life interest is given to the widow, and the accumulations are given to the children; so that every advance involves a loss to the general fund, and so must prejudice the unadvanced children unless brought into account with interest. *Hilton* v. *Hilton* (2) is on all fours with this case. That there is no magic in the use of the word "hotchpot" appears from the case of *Ackroyd* v. *Ackroyd.* (3)

Indeed, if anything, the words here are stronger than an ordinary hotchpot clause. For advances are to be taken "in satisfaction," and this must take place when the advances are made. A share, or part of a share, that is satisfied must necessarily cease to bear income thereafter either directly or indirectly.

Bramwell Davis, Q.C., and *P. F. Wheeler*, for Thomas Dallmeyer, the eldest son of the testator, took no part in the argument on the second point raised by the appellants, and upon the first point admitted that the eldest son ought to be debited with interest upon the value of the business from the date of distribution. Upon the rest of the case their argument was as follows:—

Whether or not the eldest son should be debited with interest from any earlier date is purely a question of construction, and upon this point we submit that the learned judge in the Court below was right. If the testator had intended his eldest son's share to be burdened with interest on the value of the business, nothing would have been easier than for him to have said so.

Upon the true construction of the material clauses of the

(1) 17 Ch. D. 701, 704. (2) L. R. 14 Eq. 468.
(3) L. R. 18 Eq. 313.

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will, it was clearly the intention of the testator that no interest was to be charged against the son who took the business, at any rate before the period of distribution. The testator has declared that such son is to be "debited with the value" of his business in the division of his residuary estate. Not a word is said about his being also debited with interest on such value. Nor is there even any ambiguity: *In re Tredwell.* (1) The cases which go to shew that interest is to be charged unless there is something to the contrary have been cases of administration, not of construction, and cases of advances made by the testator himself during his lifetime. This is a mere case of construction, for it is only under the will that the benefits are taken.

Warrington, Q.C., and *Horsbrugh*, for Sidney Dallmeyer. As regards Sidney, the question is whether the sums advanced to him by the trustees, under the power conferred upon them by clause 13 of the will, should be brought into hotchpot with interest or without; and we contend that no interest is payable in respect of them. Under clause 3, the son taking the business is to be debited with the value thereof at the time he declares his option; while, under clause 13, the son advanced is to take the sum advanced in part satisfaction of the share to which he may become entitled, and there is a plain distinction between the two. Looking at the whole will, the direction of the testator is not to accumulate the entire estate, but only such part of it as remains after the trustees have exercised the powers conferred upon them and performed the duties imposed upon them by the will. It is said that there is a general rule of administration that interest is to be charged on advances; but this is not so. *Hilton* v. *Hilton* (2) lays down no such general rule, and, as was remarked by Jessel M.R. in *In re Rees* (3), was a case dependent to a great extent upon the wording of a very special will.

[RIGBY L.J. I was one of the counsel in *Hilton* v. *Hilton* (2), and, according to a note which I made at the time, the trustees had not made the advances to the children in the exercise of any power in that behalf; but had on their own authority paid

(1) [1891] 2 Ch. 640, 653. (2) L. R. 14 Eq. 468.
(3) 17 Ch. D. 701, 705.

the sums in question as ordinary advances such as they thought they could safely make; and the question is, whether advances so made are on the same footing as advances made by trustees in exercise of a power.]

The authorities were considered by Sir G. Jessel M.R. in *In re Rees* (1); and in nearly all of them the period of distribution was the death of the tenant for life.

In *Poole* v. *Poole* (2) there was an attempt to charge interest before the period of distribution; but it was held that only the capital ought to be brought into the account, and no interest should be charged before the estate became divisible.

There is no case in which compound interest has been charged; and upon the true construction of this will no interest can be charged before the period of distribution.

Renshaw, Q.C., in reply.

Cur. adv. vult.

1895. Dec. 18. LORD HERSCHELL. In this case two questions arise upon the construction of the will of Mr. Dallmeyer. The first turns upon a bequest by which his sons, in order of seniority after attaining twenty-one, were to have the option of succeeding to his business of an optician, such option to be intimated by notice in writing to his trustees and executors. The testator declared that immediately on any son electing to succeed to the business, the whole of the business and the capital thereof, and the stock-in-trade, &c., employed therein should "(subject to and charged with the contingent payment thereout thereinafter mentioned) belong to him," and he was to be debited with the value thereof, estimated in such manner as the trustees should think fit, in the division of his residuary estate; and in case such value should exceed the total amount of the expectant share of such son in his residuary estate (estimated in manner aforesaid), at the time the option was declared he was to refund such excess to the testator's residuary estate by instalments or otherwise in such manner and at such times as the trustees should determine.

The testator directed his trustees to invest the surplus income

(1) 17 Ch. D. 701. (2) L. R. 7 Ch. 17.

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of his residuary estate, and to accumulate the same at compound interest for the term of twenty-one years from his decease, if any child of his should so long live and be under the age of twenty-one years, and upon the determination of the said term, which he thereafter referred to as the period of distribution, to stand possessed "of the said trust premises with the accumulations thereof" (subject to such of the trusts hereinbefore mentioned as should be then subsisting) in trust for his child or children living at the period of distribution, and the issue then living of any child or children dying before that period.

One of the testator's sons exercised the option of succeeding to the business. The value of the business at the time he declared his option did not exceed the total amount of his expectant share in the residue, so that no payment fell to be made by him. The time of distribution having now arrived, he has, of course, to be debited with the value of the business in the division of the testator's residuary estate. It is contended that he should also be debited with interest upon the sum representing that value from the time when he succeeded to the business. I can find nothing in the will to justify such a conclusion. The testator has expressly defined what the position of a son taking the business is to be. The value of the business is to be ascertained at the time he declares his option; the amount of his expectant share in the residuary estate is to be also then determined. If the value of the business exceeds the amount of such expectant share he is to refund the excess to the trustees at such times and by such instalments as the trustees may determine. The business is to belong to him on these terms, and I can see no warrant for adding the further term now contended for.

The other question which arises has reference to a claim to debit interest upon advances made to one of the testator's sons. By clause 13 of his will (which immediately follows the clause directing the accumulation of the income of the residuary estate, and fixing the period of distribution thereof) the testator empowered the trustees at any time before the period of distribution to apply out of the capital of the said trust premises any

sums, not exceeding in the whole one-half of the capital share, in or towards the establishment of any of his sons in any profession or business, or his advancement in the world in any other manner appearing to the trustees expedient—" The sums so advanced to be taken in part satisfaction of the shares to which my said sons or their issue may respectively become entitled of the said trust premises." Advances were made to one of the sons from time to time amounting in the whole to 8200*l*. It is not disputed that he must be debited with these in part satisfaction of the share to which he is entitled; but it is contended that, in addition to this, he ought to be debited with interest on those advances from the time they were respectively made. The contention is based on the fact that the testator directed the accumulation of the surplus income of the whole of the trust premises; that the advances made diminished pro tanto the amount of the trust premises bearing interest, and, consequently, the accumulations; and that if the son who received advances is allowed to have an equal share of the accumulations, he will obtain an advantage over his brothers and sisters, while the scheme of the testator was that there should be equality. If the contention be tenable, I think it follows that the son receiving advances must be debited with compound interest on the sums advanced, and not simple interest merely; if this be not done, the equal treatment which is alleged as the justification for debiting interest will not be secured.

I think the matter in controversy must be determined by a study of the language used by the testator. No case was cited in which any rule was laid down governing the present case. In the case of *In re Rees* (1) the authorities with reference to debiting interest on sums advanced were reviewed by the late Master of the Rolls. The attempt then made was to debit a child with interest in respect of sums advanced during the father's lifetime, and which were to be brought into hotchpot upon the distribution of the estate. The Master of the Rolls decided that interest ought to be debited from the period of distribution only. I can find nothing in that decision, or in the language of the Master of the Rolls, when read, as it must be,

(1) 17 Ch. D. 701.

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in connection with the point he was then considering, which supports the appellants' contention. I feel free, therefore, to allow myself to be guided by what appears to me the intention of the testator as indicated by the language he has used untrammelled by any technical rule.

The first observation I have to make on the wording of the will is, that it prescribes only that the sums advanced are to be taken in part satisfaction of the shares to which the testator's sons may become entitled in the trust premises. It does not provide that the sums advanced "with interest thereon" shall be then taken in part satisfaction. I turn then to the clause which ascertains the shares to which the children are entitled. It no doubt directs the investment of the surplus income of the whole residuary estate, and its accumulation at compound interest; but this must be read subject to the clause immediately following, which sanctions the diminution of the trust premises to the extent of the sums advanced under its authority. They then cease to bear any income which the trustees can invest. The surplus income which is to be invested and accumulated must, in my opinion, refer to the income of the trust premises which the trustees receive. When the period of distribution arrives the trustees are to stand possessed of "the said trust premises with the accumulations thereof" in trust for his children. This, I think, must mean the accumulations actually in the hands of the trustees as the result of their investment and accumulation of the surplus income. I cannot see any warrant for treating the sums advanced to a son as if they had continued part of the trust premises vested in the trustees, the income of which was to be accumulated, and so added to the actual accumulations, as a condition of allowing the son who has received the advances to share equally in the accumulations with the other children. Of course, the same result in a matter of figures might be arrived at in other ways than by debiting compound interest on the advances.

It was suggested during the argument that the accumulations ought to be regarded as accretions to the expectant shares of the several children, and that, as from time to time advances were received by one of them, his interest in the accu-

mulations ought to be treated as pro tanto diminished; but this is not, in my opinion, the scheme of the will. The persons who are to share in the division of the trust premises and the accumulations thereof are to be ascertained only at the period of distribution. I quite admit that the conclusion at which I have arrived does involve some inequality of treatment. The son who has obtained advances will be placed in a position of advantage as compared with the other children; but I am not satisfied that the testator did not so intend. When a father makes advances to some of his children during his lifetime it is conceded that, though the sums advanced are to be taken into account, when he has directed division amongst his children of his residuary estate no interest is to be debited in respect of the advances. Yet in this case the result is that there is not complete equality of treatment. The child who has obtained the advances may have had the use of the money many years before the other children receive anything, and it may not unreasonably be presumed that if the father had retained the money and received the income thereof the estate left by him for distribution would have been greater. In the present case, having postponed the division of his estate for a lengthened period, it seems to me that he may well have intended to put his trustees in loco parentis so far as advances to his children were concerned, and that those advances should be treated in the same manner as if made by himself. I do not dwell upon this or assert that it was his intention. I only give it as a reason why I am not prepared to depart from that which I understand to be the meaning of the provisions which the testator has inserted in his will.

Moreover, I think that it would not in all cases necessarily secure fair treatment if effect were given to the contention of the appellants. It may be that no injustice would be done where, as in the present case, an adult child receives advances; but the clause which authorizes those advances is not limited to such a case. It would apply equally where the trustees paid a sum of money for the purpose of apprenticing an infant or establishing him in some profession or business; and I can well conceive hardship arising in such a case, if interest could be

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debited in respect of such advance in the manner proposed. For these reasons I think that the judgment should be affirmed and the appeal dismissed with costs.

A. L. SMITH L.J. Two questions arise in this case, the one being whether the testator's eldest son, Thomas, upon the division of his father's residuary estate, which, in the events which have happened, became divisible upon April 23, 1894, amongst his children, is to be debited with interest upon the value of his father's business from the time when he succeeded to it under the provisions of his father's will in 1884 down to the period of distribution in 1894; the other being whether the testator's second son, Sidney, is in like manner to be debited with interest down to the same period upon sums amounting to between 8000*l.* and 9000*l.* advanced to him for his advancement in life by the trustees of his father's will pursuant to its provisions. [His Lordship then stated the terms of the will, and continued:—]

Now, taking the will, it seems to me clear that the testator has not directed that Thomas is to be debited with interest upon the value of the business to which he had succeeded when the time came for the division of the residuary estate. The words are, "he shall be debited with the value thereof," and in case "such value" shall exceed, as I read it, what is coming to him when the residuary estate is divided, then he is to refund such excess in such way as the trustees may direct. There is not a word about his being debited with interest, when the division takes place, over and above the value of the business. The appellants would read this clause as if it ran "he shall be debited with the value thereof with interest thereon," which is clearly not what the will says, nor, as far as I can see, what the testator intended.

Now as regards the moneys advanced to Sidney for his advancement in life, the will directs "that the sums so advanced are to be taken in part satisfaction of the share he is entitled to upon the distribution of" the testator's residuary estate.

Here, again, there is no direction that the moneys which the trustees may advance to Sidney for his advancement in life are

to be debited with interest upon the division of the residuary estate. As regards these advances, the trustees are placed by the testator in the same position as he would have been in had he not died. They are to do what presumably the testator might have done had he been alive.

It is not, in my experience, the usual thing for a father when he makes provision in life for his son to charge him interest upon money he then advances to him; and unless it be stipulated for, I certainly should draw the inference that the advances were made free of interest—not that they were to be interest-bearing loans. By the will the testator has not directed that either Thomas or Sidney is to be debited with interest upon what they may have received out of the testator's estate prior to the division of his residuary estate when that might take place.

But it was argued for the appellants that, as regards the advancements made to Sidney, unless the will directed the contrary, the rule of the Court of Equity was that in dividing the residuary estate of a testator, which was to be equally divided amongst his children, interest upon moneys advanced by way of advancement of a child in life was always debited with interest from the time of its having been so advanced down to the period of distribution of the residuary estate.

The reason assigned for this rule was that, otherwise, those of the children who had not had advances made to them for their advancement in life were not on an equality, when the time came for the distribution of the estate, with those who had had such advances; inasmuch as those to whom advances had been made had had the use of the money advanced, and had deprived the estate of its use, which money, if it had not been advanced, as regards the interest accruing thereon, would have gone to swell those accumulations in which all, when the division came, were to participate in equally.

But this, with submission, begs the question as to what it was that the children at the time of distribution were to participate in equally.

In my judgment, it is directed by this will that the children are to participate equally in the capital of the testator's estate,

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together with the accumulations which may happen to have been made after making the advances and other disbursements as directed by the will; subject to this, that in making the division Thomas and Sidney are to bring into account what they have in fact had out of the testator's estate—the one the value of the business, the other the moneys advanced. It is in what the trustees might have in hand when the period of distribution arrives that "the children then living were to participate in as tenants in common"—not in what the trustees might have had if no advancement to the son had been made.

If the rule exists, and the reason assigned for it is well founded, surely the money advanced to Sidney for his advancement in life must be debited with compound interest, and not merely with simple interest; for the hypothesis is that the child advanced must make good to the estate that which he has had to the impoverishment of the estate, which cannot be brought about unless compound interest upon the advances is calculated. The appellants' counsel, when faced with this, flinched from asserting that any rule existed to debit advances with compound interest; and it consequently appears to me that the suggested reason for the rule has no existence in fact.

Authorities were then resorted to to support the existence of the rule, and that of *In re Rees* (1), in which the cases upon the subject are collected in the judgment of Sir George Jessel, was referred to. Neither that case itself, nor the cases therein cited, are authorities for the proposition now contended for, namely, that interest is to be debited from the date of the advances made till the period of division of the residuary estate.

It will be seen that the struggle in these cases has been to get interest allowed upon advances prior to the death of the tenant for life, which was the period of distribution, and that the attempt has been universally unsuccessful. How these cases can be said to shew that there is the hard and fast rule in equity, which is now contended for, I do not see; for the cases when looked into, in my opinion, shew nothing of the sort. In my judgment, whether you look to the suggested reason for the rule, or to the cases cited, the appellants fail to establish the

(1) 17 Ch. D. 701.

existence of the rule, and that my brother Kekewich was quite right both on the construction of the will and upon the non-existence of the rule contended for, and that this appeal must be dismissed with costs.

RIGBY L.J. I regret that to one part of the judgments delivered, that is to say, as to the advances out of residue, I am unable to concur. [His Lordship then stated the facts of the case, and continued:—]

The questions raised on the appeal were whether Thomas, Sidney, and the younger children respectively, were to bring into hotchpot any and what interest on the value of the business and the advances.

Kekewich J. decided that the capital sums only were to be brought into hotchpot.

It was conceded on the appeal that interest on all the sums must be brought into account as from the date when the residuary estate ought to have been distributed, that is to say, from the date of the youngest child attaining twenty-one, and that the order appealed against must to that extent be varied.

The contest was, therefore, confined to the periods which elapsed before that date.

The case of Thomas with regard to the value of the business depends upon considerations different from those affecting the advances. By advances, throughout the judgment are meant, not advances on loan, but gifts by way of advancement.

The Court of Chancery never assumed jurisdiction to correct any inequality between children where that inequality was brought about by the plain disposition of the parent made during lifetime or by will. It only interfered to prevent inequality, or a greater inequality than the parent had plainly intended, in cases where the parent, having had occasion for expressing his intentions, had done so by directing an equal division, or, as the case might be, a definite inequality.

Thus, with reference to advances made to children by a parent during his lifetime followed by a will taking no notice of the advances, the will was treated as precluding the taking of the earlier advances into consideration.

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But advances made after the date of the will were, as a general rule, treated, in the absence of express declaration to the contrary, as operating to adeem the whole, or part of the testamentary provision for the advanced child, according as the advances were equal to or greater than, or were less than, the testamentary provision.

A will can have no effect except on property which the testator has at the time of making it, or afterwards acquires. Advances made before the date of the will cannot come out of the property dealt with by the will, and the fact of such advances having been made does not, if they are not mentioned in the will, affect the scheme of distribution which the testator intends to apply to the property.

But, although of course the will can only operate on property which the testator has at the time of his death, that event may happen at any moment; and it has been thought a reasonable presumption that the scheme of distribution indicated by the will should not be disturbed by advances subsequently made.

The business and its assets form, in the event which has happened, no part of the residuary estate of the testator.

No presumption of equality arises with reference to this gift, but the testator's intention must have effect given to it according to the terms of the will. He could, of course, impose any terms which appeared satisfactory to him. As in the case of the mansion and grounds of Sunnyfield, where three-fourths only of the value was to be paid by the son exercising the right of pre-emption, he might make the terms as favourable as he pleased to the son succeeding without infringing any doctrine of a Court of Equity.

What he really does is to direct a value to be placed on the assets which are to belong at once to the son, and that the son is to be debited with that value "in the division of my residuary estate." If the son died before the division, he never would be debited at all, and he would get the business for nothing. The only provision for payment at all arises in case the value should be in excess of the expectant shares of the son, and then payment was to be made of the excess, only and by such instalments as the trustees should think fit.

There is no reason for departing from the scheme, and the son is only to be debited in the division, though as from the date fixed for the distribution he would of course be debited with interest.

The advances to Sidney and the younger children stand on a wholly different footing.

Clause 12, dealing with the residuary estate, divides the assets into equal shares; so that we get the testator's direction for equality as the governing rule in dealing with residue—a rule not to be departed from without plain reason to be derived from other parts of the will.

It is important to observe that the real and substantial question is how far an advanced child is to share in the accumulations arising from the residue as diminished by the advance made to him. He cannot be charged with any part either of a capital sum advanced, or of interest thereon so as to be made liable to repay. The charging of interest in such a case is only an arithmetical device adopted for the purpose of ascertaining how much more he is to receive. The true principle applicable to advances out of a fund, which independently of the advances is to be equally divided, is that the unadvanced are not to be in a better or worse position, except so far as is expressly provided by the settlor, by reason of the advance. In other words, the unadvanced children are to be placed as far as possible in the same position as if no advance had been made.

All the cases cited in *In re Rees* (1), where the subject was discussed at length by the late Master of the Rolls (Sir George Jessel), recognise and profess to go upon this principle. In *Hilton* v. *Hilton* (2) Malins V.-C. (3) uses language which seems to me to be an enunciation of the principle. In *Field* v. *Seward* (4) Bacon V.-C. says it is necessary, in order to carry out the testator's intention, that there should, as far as possible, be equality.

In *In re Rees* (1) the testator had given his widow a life interest in his residue, and subject thereto had directed his trustees to divide his residue among children who, being sons

(1) 17 Ch. D. 701.
(2) L. R. 14 Eq. 468.
(3) L. R. 14 Eq. 475, 476.
(4) 5 Ch. D. 538.

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should attain twenty-one, or being daughters should attain twenty-one or marry under that age, and had further directed that advances, whether made in his lifetime or under a power in the will, should be brought into hotchpot. In that case Sir George Jessel says (1): "He," the testator, "means that none of the children who have not been advanced or who have received less than others shall suffer"; and lower down: "Therefore charging interest is only to be regarded as a mode of calculation by which, in order to place the children on an equality, the estate is put in the same position as if no advance had been made."

True it is that, in the case before him, interest was charged on advances only from the widow's death; but that was expressly rested on the ground that until her death she took the whole income; and so the children on whose account alone the hotchpot clause was introduced could take no benefit from interest charged before that date, and would lose nothing by its being withheld.

Turning again to the will before us, we find three clauses of advancement: the first in clause 6, to advance any son who has attained twenty-one either the whole or any part of his then expectant share of the legacy of 4000*l*; the second in clause 11, dealing with yearly sums applied out of surplus income for the maintenance or education of any son or daughter who shall have attained twenty-one years, which are to be taken in part satisfaction of the share to which he or she, or his or her issue, may respectively become entitled of the said trust premises; the third in clause 13, which authorizes advances out of capital to an extent not exceeding in the whole one-half of the capital share, and directs that the sums advanced are to be taken in part satisfaction of the shares to which his sons or their issue may respectively become entitled in the other trust premises. I think it is important to observe that the words "capital share" in the clause must mean expectant capital share; otherwise the power would be reduced to a nullity.

The directions as to part satisfaction contained in clauses 11 and 13 are necessary to ensure that the advances shall be

(1) 17 Ch. D. 704.

charged not only against the advanced children themselves, but also against their issue, if the issue take, and do not shew any intention that advances under these powers are to be treated on a different footing from advances out of the legacy of 4000*l*.

Any advances made to a son out of the 4000*l*. legacy would clearly disentitle the son advanced to subsequent interest in respect of the advance; so that, if the whole 1000*l*. were advanced to a son, he would get no subsequent interest.

The distinction between clauses 11 and 13 as to advances out of income and capital respectively seems intended only for the purpose of fixing the amount that may be advanced, since any income not advanced under clause 11 at once becomes capital.

In clause 13, where the capital of the share is mentioned, share must mean expectant or presumptive share, since before the period for distribution there can be no vested share.

What, then, is the meaning of the words "taken in part satisfaction," occurring in clauses 11 and 13?

It would seem that they should have their literal meaning, and that the advances should be treated as satisfying pro tanto the expectant share in respect of which they are made at the time when they are taken.

At any rate, it is not right, unless there is a clear necessity, to say that they must be taken as meaning the same thing in effect as a direction that the advanced child or his issue shall be debited in the division of the residuary estate, which is the phrase used in clause 3 with reference to the value of the business.

It would seem, therefore, and the equality which as to residue is the governing rule expressed in clause 12 requires (unless the unadvanced children are to be the worse for the advances), that the share to which an advanced child or his issue may be entitled in expectancy is to be treated as diminished by the amount of the advance as from the date when the advance is taken or made.

The strict rights of the children, on this view of the will, would be worked out by a declaration that, as between the children, the accumulations from time to time of residue are to belong to them in the same proportions in which they are for

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the time being entitled in expectancy to the corpus including past accumulations, with consequential directions.

To give effect to this, rests would have to be taken at the end of each year as to the younger children's advances, and at the dates of the actual advances to Sidney with regard to his advances.

The result would give to each child the exact part of the accumulations earned by his expectant share for the time being. After the period of distribution a charge of interest on the value of the business and on the advances would have to be made, and, as the accumulations of residue have still continued, 4 per cent. interest might be charged.

Mr. Renshaw argued, and, I think, was logically bound to argue, that if the plan of charging interest against advances during the period of accumulations were adopted, such interest should be compound interest; but the plan above suggested has the merit of carrying out exactly what could only be done approximately by the method of charging interest, and shewing upon the face of the order made the precise reason for the adjustment.

It would readily be carried into effect by an accountant, without involving more complicated account-taking than is involved in many orders of the Court made in recent times.

Solicitors: *King, Wigg & Co.*; *Steadman, Van Praagh, Sims & Co.*; *Waddington & Cheesman.*

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LOCK *v.* QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY.

[1895 L. 2480.]

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Company—Shareholder—Payment of Shares in advance of Calls—Interest on Amount Prepaid—Payment out of Capital—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 14, 38; *Table A, clause* 7.

The articles of association of a limited company provided that the board of directors "shall be at liberty from time to time, as they think fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine," and that "the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls":—

Held, that these provisions of the articles were valid, and that, there being no profits, interest on moneys paid by shareholders in advance of calls could legally be paid out of capital.

Decision of Stirling J. affirmed.

Dale v. *Martin* (9 L. R. Ir. 498; 11 L. R. Ir. 371) approved.

Motion by the plaintiffs for an injunction to restrain the defendant company, until the trial of the action or further order, from paying to shareholders who had prepaid their shares in full in advance of calls any interest on the amount prepaid, except out of net profits.

The plaintiff Lock sued on behalf of himself and all other the holders of debentures of the defendant company, and his co-plaintiff Trotman sued on behalf of himself and the other shareholders of the defendant company, other than the 20,000 ordinary shares prepaid in full in advance of calls.

The company was formed in 1878. The capital consisted of 164,992*l.* in preferred shares of 1*l.* 10*s.* each fully paid up, and 164,992 ordinary shares of 7*l.* each, on each of which 1*l.* had been called up, but on 20,000 of those shares the remaining amount of 6*l.* per share had been paid up in advance of calls.

The articles of association of the company contained the following clauses:—

40. "The board shall be at liberty from time to time, as they think fit, to receive payment from any shareholder of the whole

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or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine."

150. "All dividends on shares shall be declared by general meetings. No dividend shall be made except out of the net profits of the company, either for the year, or remaining over from previous years in some reserve fund or otherwise, but the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls."

154. "If a larger amount be paid up on some shares than on others of the same class, the dividend on the shares of that class shall be paid in proportion to the amount paid up on each share, except in so far as all or some part of the excess shall have been received by the board on the terms of paying interest thereon, in which case the part bearing interest shall not be reckoned for the purposes of dividend."

156. "The directors shall deduct from the dividends payable to any member all such sums of money as may be due from him to the company, on account of calls or otherwise."

158. "Unpaid dividends and interest on shares shall never bear interest as against the company."

In the year 1891 the company was in want of money to pay off some debentures which were falling due, and the directors issued a circular to the shareholders in which they proposed "that each shareholder shall prepay in advance of calls the amount at present uncalled upon one-tenth of his holding, or as near thereto as can be arranged, and that upon the amount thus prepaid he shall receive interest at the rate of 6 per cent. per annum. This interest will, like the debenture interest, be an annual working charge of the company, payable half-yearly irrespective of profits, and in any distribution of assets the amount of calls prepaid on these shares will rank for repayment before the outstanding share capital." In reply to this circular 20,000 of the shares were paid up in full.

During the year 1895 the company had made no profits, and the only way in which the interest upon the moneys paid in advance of calls could be paid was by paying it out of capital.

Millar, Q.C., and *E. Brodie Cooper*, in support of the motion. A company cannot legally diminish its capital by the return of any part thereof to its shareholders, even if its articles purport to give it power to do so. This transaction is ultra vires. It is, in fact, a recurring repayment of capital. Shareholders cannot pay up capital upon the terms that they shall have a perpetual payment of interest at the rate of 6 per cent. independent of profits; and a contract which is in its inception void cannot be ratified: *In re National Funds Assurance Co.* (1); *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2); *Flitcroft's Case* (3); *Guinness* v. *Land Corporation of Ireland* (4); *Trevor* v. *Whitworth* (5); *In re Sharpe.* (6) The holding of shares involves the liability to pay up the whole amount of each share in cash. There is no fetter as to time, and payment may lawfully be forborne in a going concern, though not as against liquidators. But the money must be ready at call for any purpose of the company, for by the contract of membership the money is the company's money, and the creditors of the company have a right to look to the capital of the company, and to rely upon its remaining undiminished by improper payments or returns. Accordingly, a contract of this kind is not binding as against the creditors of the company, and offends the principles laid down in *Trevor* v. *Whitworth* (7), *Ooregum Gold Mining Co. of India* v. *Roper* (8), and *In re Almada and Tirito Co.* (9)

Hastings, Q.C., and *C. E. E. Jenkins*, for the company. The shareholders who paid up their shares in advance did so upon the terms that the moneys they advanced should be applied in the payment off of terminable debentures. The transaction was a perfectly bonâ fide and proper one, and within the discretion of the directors; and the payment of lawful obligations cannot be treated as an unlawful reduction of capital. The only real question is whether interest on moneys paid in advance of calls constitutes a debt due from the company in respect of a contract lawfully entered into by them. And there is direct authority

(1) 10 Ch. D. 118.
(2) L. R. 7 H. L. 653.
(3) 21 Ch. D. 519.
(4) 22 Ch. D. 349.
(5) 12 App. Cas. 409, 415, 423.
(6) [1892] 1 Ch. 154.
(7) 12 App. Cas. 409, 415, 433.
(8) [1892] A. C. 125.
(9) 38 Ch. D. 415.

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that such interest does constitute a debt of the company payable out of its assets, including its available capital, and not merely out of profits: *Dale* v. *Martin* (1), which case was cited before Kay J. in *In re Exchange Drapery Co.* (2) There is a clear and well-known distinction between the principles applicable where dividends are paid out of capital and those applicable where interest is paid out of capital. Interest may be payable out of profits or capital; dividends should be paid out of profits only. *Dale* v. *Martin* (1) is an authority that the word "interest" in clause 7 of Table A does not mean or include "dividend." It is true that this company is not under Table A, but the provisions in its articles are in effect the same; and art. 150, while forbidding the payment of dividends out of capital, expressly authorizes directors where they have, in exercise of the powers of art. 40, received payments in advance on shares, to pay interest out of capital on the sums paid up in advance; and this is not only a lawful, but a beneficial power.

[They also referred to Palmer's Company Precedents, 6th ed. p. 313, Form 148, cl. 20; *Oakbank Oil Co.* v. *Crum* (3); *In re Leicester Club and County Racecourse Co.* (4)]

Millar, Q.C., in reply.

Cur. adv. vult.

Jan. 14. STIRLING J. This is a motion on behalf of shareholders and debenture-holders to restrain the defendant company from paying to shareholders, who have prepaid their shares in full in advance of calls, any interest on the amount prepaid, except out of net profits. The company was formed in 1878 under the Companies Acts, 1862, et seq., with a capital of 164,992*l.* in preferred shares of 1*l.* 10*s.* each, fully paid up; and 164,992*l.* in ordinary shares of 7*l.* each, on which 1*l.* was called up, but on 20,000 of which shares 6*l.* has been paid up in advance of calls. The memorandum of association contains nothing specific on the subject.

[His Lordship then referred to arts. 40, 150, 154, 155, and

(1) 9 L. R. Ir. 498; S.C. on appeal, 11 L. R. Ir. 371.
(2) 38 Ch. D. 171.
(3) 8 App. Cas. 65, 73.
(4) 30 Ch. D. 629.

158 of the company's articles of association, and to the circulars issued to the shareholders on November 4, 1891, December 18, 1891, and January, 1892, and continued :—]

During 1895 the company has made no profits, but has incurred a loss.

It has not been contended before me that the arrangements entered into between the company and the shareholders who prepaid their shares in 1891–2 were made otherwise than in good faith ; but it is said that it is beyond the powers of the company, and consequently illegal, to pay the stipulated interest out of capital, and the question whether such payment is within the powers of the company is that which I am called upon to decide. That question was answered in the affirmative in the Courts of Ireland so far back as 1882 in the case of *Dale* v. *Martin* which first came before Chatterton V.-C. (1), and afterwards before the Court of Appeal consisting of Law C., Morris C.J., and FitzGibbon L.J. (2) The judgment of the Court was delivered by FitzGibbon L.J., and it contains the following passage (3) : " The broad question must be decided by us, whether in the case of a company whose nominal capital is fixed, interest on money paid in advance of calls can be constituted a lawful debt, and made chargeable upon the assets of the company as a debtor. In the absence of some coercive authority, it would appear to me to be enough to prove the legality of such an agreement to read s. 14 of the Companies Act, 1862, which provides that a company limited by shares may adopt all or any of the provisions contained in Table A in the first schedule thereto, and to point out that Table A, clause 7, is identical with art. 22 of the defendant company. The Companies Clauses Consolidation Act, 1845, s. 24, and the Standing Orders of Parliament . . . . also clearly sanction similar engagements. A contract for payment of money if lawful must constitute a debt, and 'interest at such rate as the member paying in advance and the directors agree upon' cannot, as it seems to us, be practically made descriptive of dividends in any legal sense. . . . But then it is said the payment of

(1) 9 L. R. Ir. 498. (2) 11 L. R. Ir. 371.
(3) 11 L. R. Ir. 375.

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the interest out of capital reduces the capital below the nominal amount fixed by the memorandum. This it must be conceded the board could not do; but the answer to the objection is that this is not a reduction of capital in any sense except that of a *spending* of the capital in payment of a lawful debt, which occurs in every case in which money has to be paid out of capital in discharge of the liabilities of a company. If the contraction of the debt itself were unlawful, of course it could not be paid, or if Parliament had provided that interest on moneys paid in advance of calls should be met only out of profits, such an enactment should be obeyed; but the moment we conclude that such an agreement may be lawfully made, it must, in the absence of express or implied prohibition, bind the property of the company to the same extent as any other lawful contract, and payments out of capital in discharge of lawful obligations do not 'reduce' the capital, which is best defined as 'the property available for the creditors of the company,' except by applying part of it to its legitimate use, viz., the discharge of creditors' demands."

Two points were decided in this case: first, that the word "interest" in clause 7 of Table A did not mean dividend; and secondly, that interest on money paid in advance of calls constituted a legal debt payable out of any assets of the company including capital.

The defendant company is not governed by Table A; but in the clauses which I have read the word "interest" does not, in my opinion, mean the same thing as "dividend," with which in arts. 150 and 154 it is contrasted. There is no English decision in direct conflict with *Dale* v. *Martin*. (1) The nearest decisions are *In re Sharpe* (2) and *In re Exchange Drapery Co.* (3)

In *In re Sharpe* (2) interest was by the articles made payable on *all money paid on shares*—not merely on money paid in advance of calls.

In *In re Exchange Drapery Co.* (decided in 1888) (3) it was held that a stipulation for payment of interest on what was equivalent to money paid in advance of calls was valid as between the shareholders of the company, and must be given

(1) 9 L. R. Ir. 498. (2) [1892] 1 Ch. 154. (3) 38 Ch. D. 171.

effect to in a winding-up after outside creditors had been paid in full; but the learned judge intimates his opinion that such interest could not be proved for in competition with and as against ordinary creditors.

What was urged in the present case on behalf of the plaintiffs was that the payment of interest, in fact, amounted to a return of capital to the shareholders, and was contrary to the principles laid down by the English Court of Appeal and the House of Lords in *In re Almada and Tirito Co.* (1), *Trevor* v. *Whitworth* (2), and *Ooregum Gold Mining Co. of India* v. *Roper* (3); but this argument fails if the decision of the Irish Courts, that the interest constitutes a valid debt of the company, be well founded; and the plaintiffs can only succeed by establishing that the interest does not constitute such a debt. It is unnecessary for me to say what my opinion on this point would have been had the matter been res integra, for I have arrived at the conclusion that, as a judge of first instance, I ought to follow the case in Ireland. It was decided in 1883, and, though not binding on me, is nevertheless a weighty authority in favour of the defendant company. It is twice referred to and the effect of it stated in the last edition of Lindley on Companies (published in 1889, see pp. 321, 989): it has therefore become known in this country; and I cannot doubt that it has been acted on here. Lastly, I desire to refer to the language of Lord Macnaghten in the recent case of *Newton* v. *Debenture-holders, &c., of Anglo-Australian Investment Co.* (4), before the Privy Council, where he alludes to the importance and desirability of maintaining uniformity of practice in the administration of company law. The decision in *Dale* v. *Martin* (5) has fixed the practice in the sister country; and I think that I ought not to depart from it. The motion must accordingly be refused.

W. W. K.

The plaintiffs appealed. The appeal was heard on January 22, 1896. C. A.

(1) 38 Ch. D. 415.
(2) 12 App. Cas. 409.
(3) [1892] A. C. 125.
(4) [1895] A. C. 244.
(5) 9 L. R. Ir. 498; 11 L. R. Ir. 371.

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E. Brodie Cooper (*Millar, Q.C.*, with him), for the appellants. This payment of interest is not really a payment of a debt of the company. It is in effect a return of capital to the shareholders, and this is illegal: *Trevor* v. *Whitworth* (1); *Ooregum Gold Mining Co. of India* v. *Roper* (2); *In re Sharpe.* (3) Clause 40 of the articles and the agreement for payment of interest were ultra vires. The payment by the shareholders was not really in the nature of a loan to the company; the money was the company's own money though it was paid in advance.

[LINDLEY L.J. How can you say that clause 40 of the articles was ultra vires, when it is in substance identical with clause 7 of Table A to the Companies Act, 1862?]

Clause 7 does not say that interest may be paid out of capital. The capital ought to be kept intact for outside creditors. An ordinary loan would increase the capital of the company; this payment in advance of calls does not.

Stirling J. based his decision on *Dale* v. *Martin.* (4) That decision is not binding on this Court, and I submit that it was erroneous.

Hastings, Q.C., and *C. E. E. Jenkins*, for the defendants, were not called upon.

LINDLEY L.J. I confess I do not feel any difficulty about this case. I think the answer to Mr. Brodie Cooper's argument, in which he has done full justice to his case, is that it goes a great deal too far. If he is right, it would follow that no part of the capital of a limited company could be applied in paying to a shareholder a debt of any kind. But it is impossible to read *Trevor* v. *Whitworth* (1) and *Ooregum Gold Mining Co. of India* v. *Roper* (2), and to suppose for a moment that the learned Lords who decided those cases intended to lay down any such a proposition. It would be entirely contrary to the provisions of the Companies Act, 1862, itself. Sect. 38, sub-s. 7, and s. 101 of that Act shew that shareholders can be creditors of their own companies, and that they can prove in competition with the

(1) 12 App. Cas. 409.
(2) [1892] A. C. 125.
(3) [1892] 1 Ch. 154.
(4) 9 L. R. Ir. 498; 11 L. R. Ir. 371.

other creditors, provided only that their claims are not in the character of members, by way of dividends, profits, or otherwise. In other words, if I am a shareholder in a limited company, and I lend the company 20,000*l.* on the terms of being repaid the loan with interest, I am entitled to be repaid that 20,000*l.* and interest out of the capital of the company in competition with the other creditors, even in a winding-up. I am not entitled to rank as a creditor of the company in competition with the other creditors in respect of any capital, whether prepaid or not, or in respect of dividends, or profits, or anything of that sort. But in respect of debts contracted with me as an outsider (if I may use that expression) I am entitled to do so. Therefore, Mr. Brodie Cooper's argument goes a great deal too far. The simple question is, whether there is anything ultra vires in the provision in the articles of association which authorizes the directors to pay to a shareholder, whilst the company is a going concern, interest upon capital advanced by him before it has become due in respect of calls on his shares. I pointed out during the argument how disastrous it would be to companies to deprive them of that power. It is a benefit to a company to be able to raise money upon terms so much more favourable to itself than by contracting an ordinary debt, when it would be compelled to repay the principal as well as to pay the interest on it. By this machinery the company can raise money, by obtaining advances from the shareholders in respect of calls on their shares not yet due, upon the terms of paying to them what I may call for convenience interest upon the capital so prepaid, which interest will cease when the capital is called up. It is interest on prepaid capital; and, when the prepayment ceases to be a prepayment, no interest will be payable.

These clauses in the articles are expressly framed with a view to carry out that kind of business arrangement. Clause 154 of the articles, which was referred to by Stirling J., throws light on the true construction of clauses 40 and 150, and shews that, when the capital is called up, this arrangement for paying interest will cease, and the shareholders will all be on a par. They will have to take dividends instead of interest. It is said that clause 7 in Table A to the Companies Act, 1862, which

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authorizes directors to pay interest in respect of prepaid calls, does not authorize them to pay that interest out of capital, and Mr. Brodie Cooper contended that it must be read as authorizing the payment of interest only out of profits. I admit that the language is not as explicit as might be desired. But a construction was put upon that clause in Ireland in 1883 in *Dale* v. *Martin* (1), first by the Vice-Chancellor, and afterwards by the Court of Appeal, and it was held that interest could be paid even out of capital. We are asked to say that that decision was wrong, although it has stood from 1883, and has, I believe, been acted on ever since in England. I cannot, however, help thinking that the judgment of the Irish Court was right in principle, and that it does not in any way infringe the principles laid down and acted on by the House of Lords in *Trevor* v. *Whitworth* (2) and *Ooregum Gold Mining Co. of India* v. *Roper*. (3) The purchasing of the company's own shares is a totally different transaction, and so is the issuing of shares at a discount. The Act says that shares are to be paid for—that 20*l*. a share means 20*l*. a share, and that the 20*l*. must be paid. And the *Ooregum Case* (3) shews that this liability to pay for shares cannot be avoided by the company buying back the shares. But that has nothing to do with the payment of the company's debts. The obligation to pay debts is dealt with by ss. 38 and 101, and, having regard to those sections, it seems to me that the decision of the Irish Court was quite right. It follows that the decision of Stirling J. was quite right, and that this appeal must be dismissed.

KAY L.J. The articles of association of this company distinctly authorize what has been done. [His Lordship read clauses 40 and 150.]

Then clause 154 shews that that interest is payable only so long as the sum is in advance of calls. Are these clauses legal or illegal? If they are ultra vires, then of course the appeal must succeed. How can they be ultra vires when s. 14 of the Companies Act, 1862, says that a company "may adopt all or

(1) 9 L. R. Ir. 498; 11 L. R. Ir. 371.

(2) 12 App. Cas. 409.

(3) [1892] A. C. 125.

any of the provisions contained in Table A" in the 1st schedule to the Act, and clause 7 of Table A provides that "the directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon." That provision of Table A is made legal by s. 14 of the Act, and the provisions of this company's articles are in effect the same. It is impossible, therefore, to say that the articles, so far as they authorize the directors to agree to pay interest upon capital paid by the shareholders in advance of calls on their shares, are ultra vires of the company.

What, then, is the meaning of the provision that the directors may receive from the shareholders in advance of calls payment in respect of their shares, and may agree to pay interest on the sums so paid at such rate as they think fit? The agreement to pay interest is valid, and the effect of the transaction is that the company borrow money from their shareholders which they need not repay. This is a great advantage to the company, because, if they borrowed from outsiders, the money borrowed might be recalled and the company would have to repay it; but, borrowing it from shareholders, they are not bound to repay the capital. But they are at liberty to contract to pay interest on the money borrowed; and what is that interest which the company contract to pay? Is it anything but a debt? It is not a dividend on the shares. I cannot conceive how in law it can be considered as anything but a debt. There being a valid legal contract to pay interest upon money which the shareholder voluntarily pays in advance on the faith of that contract, the interest must be a debt created by that contract; and, if so, why should it not be paid out of capital? All debts, whether for interest or principal or anything else, may be paid out of capital. I assume that the company had no profits out of which to make these payments. The debenture-holders are

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now objecting to the payments being made out of capital. But if they are debts, how can they object? It seems to me that they are plainly debts which the company are bound by contract with the shareholders to pay—a contract which is perfectly legal.

I quite agree, if I may respectfully say so, with the reasoning of FitzGibbon L.J. in *Dale* v. *Martin*. (1) He said (2): "But then it is said the payment of the interest out of capital reduces the capital below the nominal amount fixed by the memorandum. This it must be conceded the board could not do; but the answer to the objection is that this is not a reduction of capital in any sense except that of a *spending* of the capital in payment of a lawful debt, which occurs in every case in which money has to be paid out of capital in discharge of the liabilities of a company." That is a complete answer to the argument. The company cannot reduce their capital, either by issuing shares at a discount, or by re-purchasing their own shares. That the House of Lords have decided in the two cases which have been cited. But this payment of interest is not a diminution of the nominal capital. It is not a return of capital to the shareholders. As FitzGibbon L.J. said, it is a proper spending of the capital in payment of a bonâ fide debt of the company. If I may respectfully say so, I think the decision of the Court in Ireland was quite right, and the decision of Stirling J. following it was also quite right.

I observe that in *Trevor* v. *Whitworth* (3) Lord Herschell said (4): "What is the meaning of the distinction thus drawn" (i.e. in the Companies Act, 1862) "between a company without limit on the liability of its members, and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying

(1) 11 L. R. Ir. 371.
(2) Ibid. 376.
(3) 12 App. Cas. 409.
(4) Ibid. 415.

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on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders." This payment of interest seems to me to be within the proper and lawful limits of the expenditure of the company, and therefore those words of Lord Herschell exactly apply.

A. L. SMITH L.J. I entirely agree with what has fallen from my learned brothers, and if I added anything I should only be repeating what they have said.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Trinder & Capron.*

W. L. C.

FINCH *v.* OAKE.

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[1896 F. 19.]

Voluntary Association—Member—Retirement—Acceptance.

The members of a voluntary trade protection society became such by election, and paid an annual subscription, in return for which they were entitled to legal assistance for the purposes of their trade and to some other benefits. By the rules the members incurred no obligation beyond the payment of their subscriptions. The rules contained no provision as to the retirement or expulsion of members :—

Held, that a member was entitled to retire at any time without any consent of the other members; that on the receipt by the society of a letter from a member stating his wish to retire he at once ceased to be a member, without the necessity of the acceptance by the society of his resignation; that he could not before acceptance withdraw his resignation; and that he could not become a member again without re-election.

Decision of Kekewich J. reversed.

APPEAL by the defendants against an order of Kekewich J. restraining them, until the trial of the action or further order, from excluding the plaintiff from his membership of the Bermondsey and Rotherhithe Licensed Victuallers and Beer Sellers' Trade Protection Association, and from interfering with the

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plaintiff's exercise of his rights and privileges as a member of the association.

The defendants were the chairman, the vice-chairman, the treasurer, the trustees, the secretary, and the other members of the committee of the association.

The objects of the association were stated in its rules to be—

1. "The protection of its members against frivolous and vexatious informations."

2. "The offering of rewards for the detection of persons robbing its members."

3. "The offering of rewards to persons coming to the aid and assistance of its members in cases of assault or outrage."

4. "The watching over the interests of the trade in the Legislature, and generally for the furtherance and promotion of its interests."

5. "The offering of rewards for information leading to the conviction of persons illegally selling exciseable liquors."

The rules contained the following provisions:—

1. "That any licensed victualler, or person holding a licence to sell beer to be consumed on or off the premises, be eligible to become a member of this society at any regular meeting when proposed and seconded by members, and duly elected by a majority thereof, and shall pay a subscription of 10*s*. 6*d*. per annum; all subscriptions to be paid in advance in January of each year. Any licensed victualler or beer retailer joining this society on or after the ordinary meeting in June shall be admitted a member on payment of one-half the annual subscription for that year. Any member being three months in arrears with his subscription shall forfeit all claims to the society."

2. "That brewers, distillers, wine and spirit merchants, hop merchants, maltsters, mineral water manufacturers, and the wholesale dealers directly or indirectly connected with the trade, shall be eligible to become honorary members of the society on the payment of an annual subscription of not less than half-a-guinea."

3. "The officers of the society shall consist of chairman, vice-chairman, treasurer, three auditors, and a committee of twenty-five financial members (all to be elected at the annual general

meeting in January). Five to form a quorum; all subscribing past chairmen to be ex-officio members of the committee."

4. "The secretary shall keep all accounts, conduct all correspondence, and do all things appertaining to the office; he shall also collect all moneys due to the society, and pay the same into the London and Midland Bank every day, submitting the pass-book and counterfoils to the treasurer every Monday. At the end of the financial year he shall prepare a balance-sheet, which shall be printed and distributed among the members at their annual meeting."

8. "In cases of assault, robbery, or riotous conduct on the premises of a subscribing member, he shall, without loss of time, if he wishes to avail himself of the assistance of the society, communicate particulars to the secretary or chairman, who will refer such member to the solicitor for his professional assistance, to defend the same at the expense of the society; and the solicitor shall write the result to the secretary, to be by him laid before the next meeting of the committee; and, to carry this rule into effect, the committee shall arrange with some one or more professional gentlemen; but, should it be a case involving a question of general importance to the trade, and requiring to be defended by counsel, it shall be referred to the committee, who shall be called together specially for that purpose. When a person is given into custody overnight, and is to come before the magistrate next morning, as there may not be time to procure a letter from the secretary or chairman to the solicitor authorizing him to act, the member may apply to the solicitor, who has power to deal with the case at his discretion, without the letter from the secretary or chairman, which in all other cases must be first procured."

9. "Any person who may detect and convict, or cause to be convicted, any person or persons for stealing or damaging property belonging to a member of the association, and any person who shall afford assistance and protection in case of assault or outrage on a member, his family, or servant, whilst engaged in the proper and orderly pursuit of his business, or shall in such cases protect the property of such member in a laudable manner, the committee may, upon the case being proved to

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their satisfaction by the member concerned, pay a sum of money as a reward out of the funds of the association."

11. "All expenses for petitions, deputations, prosecutions, and other legal expenses shall be paid out of the funds of the society, on the authority of the committee."

13. "The committee shall have power to set aside from time to time, towards the formation of a benevolent fund, such donations as may be received for that purpose, and such contributions from the funds of the society as may be agreed upon by a general meeting of the society, such funds to be devoted to the relief of the necessities of aged and decayed members of the society, their widows and children, under such regulations as may from time to time be agreed upon."

The rules contained no provision as to the resignation or expulsion of members.

The association had from time to time received donations from brewers, distillers, and others.

The plaintiff, who was a licensed victualler, was elected a member of the association in June, 1894. He paid the annual subscription of 10*s.* 6*d.* for the years 1894 and 1895. On October 30, 1895, the plaintiff wrote to the committee a letter in which he said, "I desire you to withdraw my name as a member of your society." He received no reply to this letter; and on November 27, 1895, having meanwhile changed his mind and desiring to remain a member of the association, he wrote to the defendant Oake, who was the chairman of the association, "Not having received an acknowledgment of my letter to you of October 30, I shall feel obliged if you will withdraw the same, as I intend to continue a member of the society."

In reply to this letter the secretary of the association wrote to the plaintiff on December 9, 1895, "I am instructed by the committee to inform you that, after due consideration of your letters, the committee unanimously resolved to accept your resignation."

Further correspondence ensued, the plaintiff insisting that he was still a member of the association, and the defendants adhering to their refusal to recognise him as such.

The plaintiff tendered to the committee his annual subscription for 1896, but they refused to accept it.

On January 7, 1896, the writ in this action was issued. By it the plaintiff claimed a declaration that he was a member of the association, and an injunction to the effect above stated. Upon a motion by the plaintiff for an interlocutory injunction, Kekewich J. was of opinion that the association had property sufficient to give the Court jurisdiction to interfere, and that the plaintiff's resignation of his membership was not effectual until it had been accepted by the committee, and that, as he had withdrawn his resignation before acceptance, his resignation was inoperative. The learned judge accordingly granted the injunction. The defendants appealed.

H. Terrell, for the defendants. This is a voluntary society, and, there being no property held on any trust for the members which the Court can enforce, there is no jurisdiction for the Court to interfere. At any rate, the defendants are not doing anything contrary to natural justice, and, even if there is jurisdiction, there is no ground for the interference of the Court: *Forbes* v. *Bishop Eden* (1); *Baird* v. *Wells* (2); *Rigby* v. *Connol.* (3) The mere payment of a subscription does not give a member such an interest in property as to entitle him to the assistance of the Court. There is no evidence that any benevolent fund has been established under rule 13.

But, even if the Court has power to interfere, there is no ground for its doing so. This is a purely voluntary society, and the members incur no obligation beyond that of paying the annual subscription. A member is at liberty to retire whenever he pleases. The other members cannot prevent him from doing so. His resignation does not require any acceptance to make it effective: *Maitland's Case.* (4)

[KAY L.J. referred to *Reg.* v. *Corporation of Wigan.* (5)]

As soon as the plaintiff's letter of October 30 was received by the secretary the plaintiff ceased to be a member of the

(1) L. R. 1 H. L., Sc. 568.
(2) 44 Ch. D. 661.
(3) 14 Ch. D. 482.
(4) 4 D. M. & G. 769, 775, 780.
(5) 14 Q. B. D. 908.

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society, and he could not become a member again without being re-elected.

Warrington, Q.C., and *Charles Church*, for the plaintiff. The rules shew that there is property of the society in which a member has during his membership a right to participate. The society without any good reason are endeavouring to deprive the plaintiff of this right. This is sufficient to give the Court jurisdiction to interfere. The society has trustees.

A member cannot withdraw from the society without the consent of his co-members. That consent not having been given, the plaintiff was at liberty to withdraw his resignation. *Reg.* v. *Corporation of Wigan* (1) depended upon the construction of a statute. At any rate the plaintiff's letter of resignation could have no effect until it had been laid before the committee, and before that had been done he had written withdrawing his letter.

LINDLEY L.J. The decision of this case turns upon a very small point, though I do not mean to say that it is entirely free from difficulty. The question is, what was the effect of the plaintiff's letter of October 30? In order to determine it we must consider the rules of the society, the provisions of which are not very complete, dealing only with certain points. There are other obligations which are not expressed in the rules. Rule 1 deals with "membership." It provides that in order to become a member of the association a person must be elected. A member has to pay an annual subscription, and if he continues to pay it he remains a member and is entitled to the benefits of the association; he need not be re-elected every year. But he is under no obligation to continue paying his subscription. The association is managed by certain officers, and there is a committee consisting of twenty-five members, of whom five constitute a quorum. The secretary is really the agent of the association for the purpose of carrying on its business; but he is subject, I suppose, to the directions of the committee. He is the most important officer; and to this circumstance I attach weight, because it has been contended

(1) 14 Q. B. D. 908.

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that the plaintiff's letter of October 30 ought to have been laid before the committee, and cannot be taken to have reached the society until it had been submitted to the committee, which appears not to have been done till after the plaintiff had attempted to withdraw it. But according to the rules I think the letter must be taken to have been communicated to the society as soon as it was received by the secretary. Then rule 13 empowers the committee to form a benevolent fund, by means of donations and contributions from the society's funds, for the relief of aged and decayed members, their widows and children. The rules contain nothing as to the expulsion of members or the right of a member to retire: these matters are left to be governed by the ordinary principles of law.

What then is the position of a member who has paid his subscription of 10*s.* 6*d.* for the current year? Can he withdraw from the association at any moment at his own pleasure, or can he withdraw only with the consent of his fellow members? In my opinion, when he has paid his subscription for the year he is under no obligation whatever to his fellow members. By paying his subscription he no doubt acquires certain rights and benefits. But what is there to prevent him from retiring from the association at any moment if he wishes to do so? Absolutely nothing. In my opinion no acceptance of his resignation is required, though of course he cannot get back the 10*s.* 6*d.* which he has paid. The other members have no power to say that he shall not retire, and there is no law that a resignation which cannot be refused must be accepted before it can take effect. If, therefore, a member of this association chooses, even from mere caprice, to retire from it, he can do so at any time without the consent of the other members, and in order that he may become a member again he must be re-elected. I can see no principle of law which entitles him to withdraw his resignation. If any authority is needed, I think *Maitland's Case* (1) and *Reg.* v. *Corporation of Wigan* (2) are in favour of this view. What then did the plaintiff do? He wrote to the committee stating that he desired to withdraw from the society. If this letter had never reached the secretary it might have been treated

(1) 4 D. M. & G. 769. (2) 14 Q. B. D. 908.

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as non-existent. But the letter did reach the secretary, and for a month afterwards the plaintiff allowed it to remain without any retractation or explanation. What then was his position? It is perfectly clear that he had ceased to be a member of the association, and he could not become a member again without being re-elected. The society might perhaps have waived the requirements of the rule, though *Reg.* v. *Corporation of Wigan* (1) seems to shew that they could not. But, in my opinion, the position which the defendants took up was perfectly right in point of law. The plaintiff has ceased to be a member of the association, and in order to become a member again he must be re-elected. The appeal must be allowed, and the injunction must be dissolved.

KAY L.J. This association is a voluntary one. There is nothing whatever in its rules which imposes on a member an obligation of any sort, except that of paying his annual subscription. He has no duties to perform. He is merely entitled, on paying his subscription in advance, to share in the benefits mentioned in the rules. He may have the advantage of being defended at the expense of the association in legal proceedings against him. And the committee have power, by rule 13, to set aside towards the formation of a benevolent fund such donations as may be received for the purpose, and such contributions from the funds of the society as may be agreed upon by a general meeting, for the relief of aged and decayed members, their widows and children. These are the principal advantages which a member derives from the association. The plaintiff, having become a member, and having paid his subscription for the current year, before the end of the year sent a letter to the committee, in which he intimated in the plainest possible terms his desire to withdraw from the association then and there. It is said that, before his resignation had been accepted by the association, he withdrew it. But why was any consent to his withdrawal from the society required? As a voluntary member of a voluntary society he had said, "I do not wish to continue a member any longer." It has been suggested

(1) 14 Q. B. D. 908.

that the committee might have incurred obligations beyond the amount of the society's funds, and that the plaintiff would be liable in respect of those obligations. I dissent from that view altogether. The committee have no power under the rules to impose any liability on a member beyond the payment of his annual subscription. If the committee had such a power, the result would be, that any member would be liable without any limit for the costs of any amount of litigation in which the committee might choose to indulge. This is an utterly extravagant notion. If, then, a member incurs no liability beyond the payment of his annual subscription, why need he, in order to withdraw from the society, do more than give notice to the committee that he does not wish to continue a member any longer? How can he be entitled, after he has done so, to say to the committee, "As you have not answered my letter, I choose to be a member of the society again without any re-election"? In my opinion, after his letter of resignation had been received, the plaintiff could not become a member of the society again without being re-elected. The appeal must be allowed, with costs in both Courts.

A. L. SMITH L.J. What was the position of the plaintiff after his letter of resignation had been received? He was no longer a member of the association, and he had nothing whatever to do with it. The association had no power to refuse his resignation, and he had a perfect right to withdraw from it at any time he pleased. This he did, and for a whole month he was not a member of the association. Now how could he become a member again? In my judgment, only by re-election. Assuming, therefore, that the Court has jurisdiction to interfere, it certainly ought not to interfere in such a case as this. I agree that the appeal should be allowed.

It was then arranged by consent that the hearing of the appeal should be treated as the trial of the action, and that the action should be dismissed, with costs in both Courts.

Solicitors: *C. O. Pook; Maitlands, Peckham & Co.*

W. L. C.

C. A.
1895
NORTH J.
Dec. 14, 17, 18.
C. A.
1896
Jan. 30, 31;
Feb. 20.

EMSLEY *v.* NORTH EASTERN RAILWAY COMPANY.

[1895 E. 1248]

Railway—Statutory Powers—Expiration of Period for Completion of Works—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.

Sect. 16 of the Railways Clauses Consolidation Act, 1845, empowers a railway company, subject to the provisions of the special Act, to execute various works and "from time to time" to alter, repair, or discontinue the before-mentioned works and substitute others in their stead:—

Held (by Lindley and A. L. Smith L.JJ., affirming North J., Kay L.J. deciding upon other grounds), that the powers of this last clause were not subject to a restriction in the special Act as to the time for the completion of the railway.

THIS was a motion for an injunction to restrain the defendants the North Eastern Railway Company until the trial of the action from building so as to interfere with the plaintiffs' ancient lights. The defendants were making certain alterations at their station at Leeds, including the removal of a parcels office and the erection on a different site of a new parcels office. This was the building of which the plaintiffs complained.

By the Leeds New Railway Station Act, 1865 (28 & 29 Vict. c. cclxvii.), which incorporated the Lands Clauses and Railways Clauses Consolidation Acts, 1845 (s. 2) (1), and provided that the interpretation clauses in the incorporated Acts should apply to that Act (s. 5), the North Eastern Railway Company and the

(1) Sect. 16 of the Railways Clauses Consolidation Act provided as follows:—

"Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway . . . . to execute any of the following works, that is to say":—

The works which the company might execute were enumerated in six clauses, of which the last three provided as follows:—

"They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they think proper;

"They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

"They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

The section concluded with a proviso as to damages.

London and North Western Railway Company were empowered to make a new station at Leeds and a railway connecting it with the Midland Railway (s. 13).

Sect. 14 enacted that "The powers for the compulsory purchase or taking of lands for the purposes or objects of this Act shall not be exercised after the expiration of three years from the passing thereof."

Sect. 36 provided: "The railway by this Act authorized shall be completed within five years from the passing thereof, and on the expiration of that period the powers by this Act, or the Acts incorporated herewith, granted for executing the same or otherwise in relation thereto, shall cease to be exercised, except as to so much of that railway as shall then have been completed, and also except those powers which are by the same Acts, or any of them, declared to be continued, or which may lawfully be exercised for a longer period."

Under the Act of 1865 the defendants built a new station and constructed the railway there contemplated, but the station becoming inconveniently small the defendants, in 1891 and 1894, obtained further special Acts enabling them to enlarge their station.

Under the Act of 1891 the defendants acquired land adjoining that which they had previously acquired under the Act of 1865. They pulled down the greater part of the station and offices (including the parcels office) which had been constructed under the powers of the Act of 1865, and rebuilt and enlarged the old station and offices, using for that purpose land acquired under the Act of 1865, and the additional lands acquired under the Act of 1891.

The greater portion of the site of the new parcels office was acquired in 1868 under the Act of 1865, within the period limited by that Act for the acquisition of land. The rest was acquired in 1895 under the Act of 1891.

The motion came on for hearing before North J. on December 14, 1895.

Henry Terrell, for the plaintiffs, in support of the motion. The power of the railway company to construct the works

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complained of, if it could have been done under their Act of 1865, expired at the end of the five years within which, under s. 36 of that Act, the railway authorized by the Act was to be completed. The interpretation clause, s. 3 of the Railways Clauses Consolidation Act, 1845, makes the word "railway" in the special Act include all the works authorized by the special Act; nor does s. 16 of the Railways Clauses Consolidation Act confer power to do the work at this late period, for the powers of that section are controlled by s. 36 of the special Act.

After the time limited for the completion of the works a railway company will be prohibited from exercising their extraordinary powers: *Richmond* v. *North London Ry. Co.* (1); *Loosemore* v. *Tiverton and North Devon Ry. Co.* (2) The railway company will not be allowed to interfere with the rights of others for the mere purpose of saving expense; the buildings complained of could be erected elsewhere: *Pugh* v. *Golden Valley Ry. Co.* (3)

Swinfen Eady, Q.C., and *Butcher*, for the defendant company. If the defendants are acting within their powers, it cannot be questioned that the only remedy the plaintiffs have for loss of access of light is by way of compensation under the Lands Clauses Act, 1845: *Duke of Bedford* v. *Dawson.* (4)

Sect. 36 of the special Act of 1865 only applies to the railway authorized by the Act; it does not limit the time for constructing the station and works connected with it. By sect. 14, where the limit of time for the compulsory purchase of land is fixed, that limit of time is made applicable to all the objects of the Act; in many other provisions in the Act, also, the railway is treated as a separate thing from the station; so that the context is repugnant to the extended construction sought to be put upon the word "railway," and the interpretation clause in the Consolidation Act does not apply.

Supposing the defendants have not power to do what they are doing by their special Act of 1865, they have power under s. 16 of the Railways Clauses Consolidation Act, 1845, among other things, from time to time to pull down and sub-

(1) L. R. 5 Eq. 352; 3 Ch. 679.
(2) 22 Ch. D. 25; 9 App. Cas. 480.
(3) 15 Ch. D. 330.
(4) L. R. 20 Eq. 353.

stitute a new building such as a parcels warehouse. It would be repugnant to the nature and object of this provision to make the words from time to time mean within five years: *Attorney-General* v. *Metropolitan Ry. Co.* (1) The company are authorized by Act of Parliament to use this land in the way proposed; the interference with the plaintiffs' lights alleged is necessary to that use, and the company are not bound for the convenience of the plaintiffs to choose a different site: *London, Brighton and South Coast Ry. Co.* v. *Truman.* (2)

Henry Terrell, in reply.

NORTH J. In the present case the plaintiffs complain of the interference with the ancient lights of their building by reason of certain acts which the defendants are doing. I think they have proved their case, that there is an injury that will arise to their building, and I think it follows that the plaintiffs are right unless it can be shewn that the defendants are in some way executing the works under statutory powers which they have acquired. If they have statutory authority to do the works, then the plaintiffs must fail in this action, although it is conceded that they would, if they have sustained damage, be entitled to compensation, and, so far as the evidence before me goes, I think there is a case of such damage made out. The question, therefore, is whether the defendants can justify what they are doing on the ground that they are authorized to construct such building as they are erecting upon the site in question.

[After referring to certain sections of the defendants' special Act of 1865, and the mode in which the defendant company had acquired the land on which they were intending to erect the building objected to, and saying that the defendants' later Acts did not, in his opinion, apply, his Lordship proceeded:—]

It is clear from the facts proved before me that the defendant company have power to build upon the piece of land in dispute, and, in fact, it is not contended now by Mr. Terrell that they have not the power to do so; but he says the only right they have is the common law right of owners to do so, and therefore

(1) [1894] 1 Q. B. 384. (2) 11 App. Cas. 45.

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they can only do it in such a way as not to interfere with their neighbours' lights. That is the whole question: whether their power of building on this land is limited to a building which must be built on the terms on which an owner of land must build, having regard to the lights of his neighbours, or whether they may build irrespective of the plaintiffs' rights of light, but subject always to their right of compensation. I think that the railway company have a right to build as they are doing, and that the application by the plaintiffs for an injunction must fail.

As the later special Acts do not apply, we must go back to the old Act of 1865, with which the Railways Clauses Consolidation Act is incorporated; and the question is whether there is power to do it under that Act. I think there is. It is said there is not for this reason: first, that the railway and the works authorized by that Act were bound to be built within five years from the passing of the Act, and that anything completed by that time might be authorized; but nothing commenced now, for the first time, can be authorized by that Act. Now there are two difficulties in the way of the plaintiffs on that point. I am not quite satisfied that the plaintiffs are right in the construction which Mr. Terrell put on s. 36 of the Act of 1865 when he says that the period for completing this station was limited to five years. It is true that the Railways Clauses Consolidation Act uses the word "railway" as meaning railway and works, but that is subject to this, that it provides "The following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction." Then, what is important here is the definition, and it says: "The expression 'the railway' shall mean the railway and works by the special Act authorized to be constructed." I am not quite satisfied that there is not something in the present Act which is inconsistent with the meaning attaching to the word "railway" by the definition in s. 3 of the general Act.

[His Lordship considered some of the sections of the special Act of 1865 as bearing on this point, and proceeded:—]

But I do not intend to decide this case upon that point. I

am prepared, for the purpose of my decision, to assume that "railway" in the 36th section of the Act does include a railway station and works. I still think the railway company have power to do what they are doing under the Act of 1865, and the Act incorporated therewith—that is to say, s. 16 of the Railways Clauses Act. Now s. 16 says: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." Then there are six separate clauses saying what may be done. The first is constructing tunnels, embankments, bridges, roads, and so on; the second is that they may alter the course of any rivers; and the third is that they may make drains or conduits. Then the fourth is this: "They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs . . . . and other works and conveniences as they think proper." Those four clauses say what may be done. Those are for the purpose of constructing the railway. Then we come to the 5th clause: "They may from time to time alter, repair or discontinue the before-mentioned works, or any of them, and substitute others in their stead." Now, pausing there for a moment, I see nothing whatever to shew that any buildings erected during the period which the company have for constructing the railway are to be taken away at the end of the time. I find nothing indicating anything of that kind. I cannot imagine any reason, either upon the face of the Act or otherwise, why it should have said, if the company have erected a warehouse, for instance, for the purpose of the construction and completion of the station, that they should take it away at the end of that period; and if they are not bound to take it away, I do not see why they should not alter or repair it after that period; in fact, the Act says they may from time to time do so. I find no reference whatever, whether direct or implied, indicating that from time to time is before the expiration of the period for the completion of the works. I take it, therefore, that the provision is that they may from time to time alter, repair, or

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discontinue any of these works, and substitute others in their stead. Therefore, if they have a warehouse that has been built as part of the construction of the works, they may from time to time, even after the period fixed for completion, take away that warehouse and substitute another in its stead. Then comes the 6th clause, which I will read, and that says: "They may do all other acts necessary for making, maintaining, altering or repairing and using the railway." Now the railway company have made this warehouse, and they have used it down to the present time; but, in the exercise of their powers contained in the original Act and in later Acts, they have had to increase and alter their station. The evidence, as I read it, with respect to which there is no dispute (and it has not been attempted to cross-examine the witnesses), is, that it is necessary to remove the existing warehouse for the purpose of alterations that have to be made; and that being so, it is necessary to substitute another for it. Then Mr. Terrell says that it is not necessary to put one in its place, or that it is not necessary, if they do put one in its place, to build it to such a height that it will interfere with the lights of the plaintiffs' warehouses. But I do not think it is for the plaintiffs to dictate to the railway company where they shall put their building, or the height to which they shall build. It seems to me to be necessary for the purpose of a station that they should have a warehouse somewhere. They have power, as I read s. 16 of the Railways Clauses Act, to discontinue their present warehouse and substitute another in its stead; and I do not read the sub-section to mean that they are to rebuild in the same place what is taken away. Then that being so, it is essential and necessary that they should have a warehouse. It is necessary, according to the evidence, that they should alter their station by the removal of the existing warehouse. That being so, it seems to me to be necessary, within the meaning of the Act, that they should build another in its place. Mr. Terrell says that they need not build another at all, that they may go somewhere else, and that they may get premises elsewhere for the purpose. No doubt, if you go to a distance, you may find accommodation; but the question is, what is necessary for the convenient use of

the railway? It is not a mere question of saving expense, but a question of concentrating their works. It seems to me idle to suggest that they might cross the street possibly, or some of the streets, and find convenient buildings elsewhere. I do not think they are bound to do anything of the sort. It is not suggested that the railway company are not acting in good faith in building this warehouse where they are, and to the height to which they intend building it. That being so, it seems to me they have powers under the Act to do what they are doing.

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D. P.

The plaintiffs appealed. The appeal came on for hearing on January 30, 1896. C. A.

Balfour Browne, Q.C., and *H. Terrell*, for the plaintiffs. If the defendants were executing works under their statutory powers, no doubt the plaintiffs would be restricted to compensation under s. 6 of the Railways Clauses Consolidation Act, and s. 68 of the Lands Clauses Consolidation Act; but the powers conferred by the Act of 1865 have long since expired, and although the defendants could still continue their works on land acquired within the prescribed period, subject to their not affecting the rights of third parties—*Tiverton and North Devon Ry. Co.* v. *Loosemore* (1)—for the present purpose they are in the same position as an ordinary landowner building on his own land: *Caledonian Ry. Co.* v. *Colt* (2); *Richmond* v. *North London Ry. Co.* (3)

[LINDLEY L.J. referred to *Great Northern Ry. Co.* v. *East and West India Docks and Birmingham Junction Ry. Co.* (4)

A. L. SMITH L.J. referred to *Attorney-General* v. *Metropolitan Ry. Co.* (5)]

That case does not apply, because there the damage was caused, not by the execution of the works, but by the working of the railway. Sect. 16 of the Railways Clauses Consolidation Act is subject to three restrictions. The powers thereby

(1) 9 App. Cas. 480, 517.
(2) 3 Macq. 833.
(3) L. R. 3 Ch. 679.
(4) 7 Rail. Cas. 356.
(5) [1894] 1 Q. B. 384.

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conferred are subject to the provisions of the special Act; they are conferred for the purpose of constructing the railway, and the works must be necessary. By s. 36 of the special Act of 1865, the time for constructing the railway—which by the Railways Clauses Consolidation Act includes all the works authorized by the special Act, and therefore includes the station: *Cother* v. *Midland Ry. Co.* (1)—is limited to five years, and after the expiration of that time s. 16 of the Railways Clauses Consolidation Act has no application. North J. has proceeded upon the words "from time to time" in the fifth heading in s. 16, but all the headings are governed by the language of the first part of the section. Even if the powers in the fifth heading are still alive, the new office is on a different site, and cannot be treated as a substitute for the old one. Lastly, the powers are confined to acts done in the construction of the railway and necessary for its construction, for it has been held that the word "necessary" in the last heading governs the whole section: *Reg.* v. *Wycombe Ry. Co.* (2) This new office is not a necessary work within the strict meaning assigned to that term by the authorities: *Fenwick* v. *East London Ry. Co.* (3); *Pugh* v. *Golden Valley Ry. Co.* (4); *Simpson* v. *South Staffordshire Ry. Co.* (5); *Morris* v. *Tottenham and Forest Gate Ry. Co.* (6)

[LINDLEY L.J. referred to *Sadd* v. *Maldon, Witham, and Braintree Ry. Co.* (7)]

That case can no longer be treated as an authority on this point.

Swinfen Eady, Q.C., and *Butcher*, for the defendants. The parcels office is a necessary consequence of the enlargement of the station, and, having regard to the exigencies of the public, it is a necessary work. The language of the fifth heading of s. 16 of the Railways Clauses Consolidation Act shews that the powers therein comprised were not intended to be exercised within the limit of time prescribed by the special Act, although it may well be that the first four headings, which

(1) 5 Rail. Cas. 187.
(2) L. R. 2 Q. B. 310.
(3) L. R. 20 Eq. 544.
(4) 15 Ch. D. 330.
(5) 4 D. J. & S. 679.
(6) [1892] 2 Ch. 47.
(7) 6 Ex. 143.

deal with the construction of the railway, may be subject to such restriction as to time. We submit, therefore, that this power of substitution is one of those powers which is expressly reserved by s. 36 of the Act of 1865. There is no ground for saying that the substituted building must necessarily be upon the same site as the old one.

[They cited *London, Brighton and South Coast Ry. Co.* v. *Truman* (1) and *Hutton* v. *London and South Western Ry. Co.* (2)]

Balfour Browne, Q.C., in reply.

Cur. adv. vult.

Feb. 20. LINDLEY L.J. This is an appeal by the plaintiffs from an order of North J. refusing to restrain the defendants from interfering with the plaintiffs' ancient lights. The lights are ancient. The defendants are building a parcels office at Leeds, and this building will to some material extent darken the ancient light of the plaintiffs. The new building was nearly completed before the action was commenced, and was carried up to its full height, or nearly so, when the notice of motion for an injunction was served. North J. did not, however, refuse the injunction upon the ground that it would be useless as regards future building, nor upon the ground that it was too late to order the building to be pulled down. The learned judge decided against the plaintiffs upon the ground that the company was entitled to erect the new building under statutory powers, and that the plaintiffs' remedy was not by an action but to obtain compensation under the Lands Clauses and Railways Clauses Consolidation Act, 1845. The appellants contend that this view of the case is wrong, and that, even if they are not entitled to an injunction, at all events they will be entitled to damages in the action when it comes on for trial. The question thus raised is of very great and general importance. [His Lordship stated the circumstances under which the new office was built, referred to the Acts of 1865 and 1891, and he continued as follows :—]

The plaintiffs, by their counsel, contended that the new

(1) 11 App. Cas. 45. (2) 7 Hare, 259.

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parcels office was not necessary for altering or using the railway and works authorized by the special Acts within the meaning of s. 16 of the Railways Clauses Consolidation Act, 1845, even if it applied to the case, which I will consider presently. But the uncontradicted evidence filed by the company proves the contrary, and is really quite conclusive on this head. [His Lordship discussed the evidence on this point, and continued:—]

The plaintiffs also contended that as the new parcels office is not on the site of the old one, the new one cannot be regarded as a substitution for the old one within the meaning of the same s. 16. But here, again, the evidence and the plans dispose of the contention. Whether one building can be fairly regarded as a substitute for another, in my opinion, must depend not only on its exact locality, but on a consideration of locality and connection with other works and mode of user. I cannot bring myself to say, either as a matter of law or of fact, that one parcels office cannot be a substitute for another parcels office, because, although wanted at the same station, the first is situate a few yards from the place where the second formerly stood.

I now come to the real and only difficulty in the case, which is to determine whether in building the new parcels office the company ought to be regarded as exercising statutory powers or only the ordinary rights of a landowner. If the former, this action cannot be supported, and the plaintiffs' remedy will be to seek compensation under the Lands Clauses and Railways Clauses Consolidation Acts; if the latter, although they may fail in obtaining a mandatory injunction, they will be entitled to damages at the trial. A statutory power is, I apprehend, a power conferred by statute to do something which could not be lawfully done without it. A statute is not wanted to enable even a company to build on land which is its own if the company has capital properly applicable to the purpose. Herein lies the strength of the plaintiffs' case. They contend that what the company is doing it is doing as landowner and not under statutory powers at all, for they say: first, such powers are not wanted, and ought not, therefore, to be held to exist; and, secondly, that if statutory powers are wanted, the time for

their exercise under the Act of 1865 has long since expired, and that the Act of 1891 gave the company no further time for their exercise over land which belonged to the company before that Act passed. I will consider each of these contentions in turn.

The first contention—namely, that statutory powers are not wanted to enable the company to build on its own land, and ought not, therefore, to be treated as existing—appears to me to beg the question and to go too far. Statutory powers are not wanted simply to enable the company to build on its own land, but statutory powers are wanted to enable the company to build even on its own land so as to infringe other persons' rights on the terms of compensating them in the manner prescribed by the Consolidation Acts. A railway company, when it has acquired the land on which its rails are laid, requires no statutory power to run trains over it; but the company does want statutory power to do so in such a way as to commit an unavoidable nuisance without being exposed to actions for damages, and the company has such a power accordingly: *Vaughan* v. *Taff Vale Ry. Co.* (1); *Hammersmith and City Ry. Co.* v. *Brand.* (2) Here is one instance in which a railway company exercises statutory powers over its own land and not merely the ordinary rights of a landowner. In this particular instance, moreover, the person injured has no remedy either by action or by compensation under the Consolidation Acts. Again, no one denies, and it is common knowledge, that within the time limited by a special Act for the construction of a railway and the works connected with it, a railway company can construct the authorized works on its own lands after it has acquired the ownership of them without being liable to actions for infringing the rights of other persons. In the absence of negligence, persons injured by the construction of such works within the prescribed limits of time have a remedy, but their remedy is to obtain compensation under the Consolidation Acts, and not by an action for an injunction or damages. The mere fact, therefore, that the company is building on its own land does not shew that it cannot be exercising statutory

(1) 5 H. & N. 679. (2) L. R. 4 H. L. 171.

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powers and cannot claim the benefit of the compensation clause, instead of exposing itself to actions on the part of those who may be unavoidably injured by the construction of authorized works.

There remains the second point—namely, whether the time within which the statutory powers conferred on the company by s. 16 of the Railways Clauses Consolidation Act, 1845, has expired. That section, if applicable, clearly applies to this case. It must be taken in connection with s. 36 of the Act of 1865. [His Lordship read the section.] The last words of this section which at first seemed important really are not so, for they have no operation until the powers which can be lawfully exercised for a longer period have been ascertained. That, however, is the difficulty in the present case; and s. 36 of the Act of 1865 is of no assistance in solving this difficulty. Sect. 16 of the Railways Clauses Consolidation Act, 1845, empowers the company to do various things, and it is remarkable that the clause which relates to repairs and substitution enables the company to do those things "from time to time." It has never yet been decided that this power cannot be exercised after the period for completing the works has expired, and I am not prepared to be the first to hold that it cannot. The reason of the thing and the expression "from time to time" lead me to think that it can. It is said that this construction will lead to great abuse, but persons unavoidably injured are sufficiently protected by the compensation clauses and by the conditions with which the company must comply; for the section only protects the company when what it is doing is necessary for the purpose of constructing the railway and other authorized works: see *Reg.* v. *Wycombe Ry. Co.* (1) [His Lordship held further that the special Act of 1891 applied to the case, and that on that ground also the defendants were acting within their statutory powers.] This appeal, therefore, must be dismissed with costs.

KAY L.J. The plaintiffs seek an injunction on interlocutory motion to restrain the defendants from building so as to obscure ancient lights in the plaintiffs' house. The learned judge

(1) L. R. 2 Q. B. 310.

declined to make any order. The plaintiffs appeal. The defendants' building is now carried to its full height, and it is hardly a case in which a mandatory injunction would be granted before the trial of the action. But some important questions have been argued, and probably it will be convenient to all parties to have the decision of this Court upon them. At the time when the notice of motion for an injunction was given the building had not been carried up to its full height, and therefore strictly the plaintiffs have a right to ask for the decision of the Court as though that were the state of the facts. The defendants' building complained of is a goods or parcels warehouse in Leeds, connected with the defendants' railway station there by a subway and in close proximity to such station.

The land on which it was built was acquired as to the larger portion under a notice to treat dated June 23, 1868, and as to the rest under a notice given in 1895.

It is argued that as to this land, or at all events the portion acquired under the notice in 1868, the statutory powers of the company to construct railway works expired long ago, and that the railway company in executing this building are only exercising the powers of ordinary landowners, and are subject to injunction. The contention of the defendants is that as to the whole of the building they are acting under a statutory power of constructing it, and therefore the only remedy of the plaintiffs is under s. 68 of the Lands Clauses Act to obtain compensation as persons whose land is injuriously affected by the execution of the defendants' works.

The notice to treat in 1868 was given under a special Act of the railway company obtained in 1865, which incorporated the Lands Clauses Act and Railways Clauses Act, and authorized the making of the railway and station. Sect. 36 of this Act provided that the railway thereby authorized should be completed within five years, and that on the expiration of that period the powers thereby or by the Acts incorporated therewith granted "for executing the same or otherwise in relation thereto shall cease to be exercised except as to so much of that railway as shall then have been completed, and also except

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those powers by the same Acts or any of them declared to be continued or which may lawfully be exercised for a longer period."

Much argument has been addressed to the meaning and effect of those exceptions. It is urged that as to a completed railway or station, the power of adding to or enlarging a station, or even building a new station upon a site used for that purpose for the first time, is continued by the first words of the exception as a statutory power; and secondly, if that were not so the company rely on s. 16 of the Railways Clauses Consolidation Act, 1845, which authorizes a railway company, "subject to the provisions and restrictions in this and the special Act . . . . for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned," among other things to erect warehouses and stations, and "from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead," and "do all other acts necessary for maintaining, altering, or repairing and using the railway." This section, it is argued, is not restricted to the time fixed by the special Act for completion of the works. On the other hand, it is pointed out that the section relates to the construction of the railway, and is subject to the provisions of the special Act which include the restriction as to time for completion, and also the before-mentioned works include tunnels, embankments, aqueducts, bridges, roads, &c., and it could hardly mean that any of such works might be discontinued and others substituted at any time under statutory powers. The question involves considerable difficulties, and I should like to consider it further before expressing an opinion upon it if it were necessary to decide it. But in this case it does not seem to me to arise by reason of the subsequent Acts of Parliament obtained by the company to which I proceed to refer.

[His Lordship then referred to the Acts of 1891 and 1894, and held that the building complained of was erected under the statutory power given by the Act of 1891 to extend the Leeds new station, and that the interference with the plaintiffs' easement of light was a matter for which they might obtain com-

pensation under s. 68 of the Lands Clauses Act, and that their remedy by injunction was taken away.]

A. L. SMITH L.J., after stating the facts and referring to the Acts of 1865 and 1891, continued:—The point taken by the plaintiffs is that the company have no statutory power to erect the parcels office upon any part of the land taken under the Act of 1865, because the five years' limit prescribed by that Act for the completion of the railway had expired, although it had not expired as regards the completion of the railway upon the small piece of land acquired under the Act of 1891.

[His Lordship referred to the Act of 1891, and expressed a doubt whether it applied, and continued as follows:—]

Sect. 36 of the Act of 1865 enacts that "the railway by this Act authorized shall be completed within five years from the passing thereof, and on the expiration of that period the powers by this Act, or the Acts incorporated herewith, granted for executing the same . . . . shall cease to be exercised, except as to so much of that railway as shall then have been completed, and also except those powers which are by the same Acts, or any of them, declared to be continued, or which may lawfully be exercised for a longer period."

I am inclined to think that "the railway" in this section must be read as meaning "the railway and works," because the interpretation clause of the Railways Clauses Consolidation Act, 1845, which is incorporated with the special Act of 1865, enacts that the expression "the railway" shall mean the railway and works by the special Act authorized to be constructed. It is not, however, in my view of this case, necessary to decide this point.

It appears to me that the limit of five years mentioned for the completion of the railway in s. 36 of the Act of 1865 is subject to this, that if the company have powers which are declared to be continued, or which may lawfully be exercised for a longer period than five years, then they may execute such powers although the five years have elapsed.

Now, what is the true reading of s. 16 of the General Consolidation Act of 1845? It enacts that "subject to the

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provisions and restrictions in . . . . the special Act . . . . it shall be lawful for the company for the purpose of constructing the railway . . . . to execute any of the following works" (the letters are mine) :—

(*a*) To make temporary or permanent inclined planes within the lands described in . . . . the plans or books of reference.

(*b*) To alter the course of non-navigable rivers within the same lands and make bridges under or over the same and to alter the course of streets.

(*c*) To make drains . . . . into through or under lands adjoining the railway for the purpose of conveying water from or to the railway.

(*d*) To erect such houses warehouses offices or other buildings yards stations wharfs engines machinery apparatus and other works and conveniences as the company think proper.

And by clause (*e*) it is enacted that "the company *may from time to time* alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead."

And by (*f*) they "may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

This last limb of this section (*f*) has been held to be in reality a proviso upon the whole section, for it has been held by the Court of Queen's Bench in *Reg.* v. *Wycombe Ry. Co.* (1), approved of in this Court in *Pugh* v. *Golden Valley Ry. Co.* (2), that the works authorized by this section must be works necessary for making, maintaining, altering, or repairing, or using the railway. The important question now raised is whether, if these works have been constructed within the time limited for making the railway (in this case five years from the passing of the special Act), the company may from time to time, either within or after the five years, alter, repair, or discontinue any of such works and substitute others in their stead.

Take the case in hand, namely, that of a station built within the five years, and apply paragraph (*e*) to it. Paragraph (*e*) enacts that the company may from time to time (without any limit as to time—the words are "from time to time") alter or discontinue a station and substitute another in its stead, and

(1) L. R. 2 Q. B. 310. (2) 15 Ch. D. 330.

from time to time repair the same. This clearly applies to a part of as well as to the whole of a station.

Why is this alteration, or discontinuance and substitution, or repair to be limited to the period of five years wherein the railway is to be constructed? It is said it is unreasonable to construe the section without this limit, for, if so, the company might alter or discontinue and substitute in its stead an inclined plane, or the course of a non-navigable river, or a street, or the drains mentioned in (*c*) after the five years. Why not, if such works become necessary for the maintenance and user of the railway, and which, indeed, might be so necessary, either for maintaining the railway itself or for carrying the traffic thereon which the public require to have carried, that without them the whole undertaking would become unworkable?

I see nothing unreasonable in this, and I cannot think that the suggested limited construction is the true one, and certainly no such limit is to be found in the paragraph itself.

The whole tenor of railway legislation has been to give the railway companies power to execute and uphold works which are necessary to enable them to maintain and work their railway, and to afford proper accommodation for their traffic as against the rights of individuals, it being considered for the public benefit that this should be so, but always subject to this, that if, in the execution of such works, the company injuriously affect the property of individuals they must make compensation to them for so doing.

If we are to cut down paragraph (*e*) of s. 16 of the Railways Clauses Consolidation Act of 1845, as we are invited by the plaintiffs to do, we shall be forcing a railway company either to buy off landowners at their own price when alterations, or repairs, or substitution of existing works which became necessary for the maintenance or user of the railway happen to injure the property of an individual, or else to force the company to incur the expense of going to Parliament and obtaining further powers.

In my judgment, paragraph (*e*) of s. 16 of the General Consolidation Act of 1845 was inserted and worded as it is—"from time to time"—expressly in order to obviate either of these results,

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and to enable a railway company to exercise the powers therein mentioned whilst they are working their railway without being liable to the Court of Chancery or any other Court stopping them by injunction, but with this limitation, that the company must pay compensation to persons injured by such exercise of their powers. This, in my opinion is why statutory powers are given to a railway company.

It was argued that if s. 16 of the General Consolidation Act authorizes a railway company to discontinue works and to substitute others, it must mean that the substituted works are to be erected on the same site as the discontinued works. I can find no indication of this in the section. The words are not that the substituted works are to be in the *place* of the discontinued works, but in their stead. Whether new buildings can in any particular case be regarded as substituted for others on a different site must depend on the circumstances of the case. In this case the conclusion is obvious that the substitution is a real and honest substitution, and not merely a pretended one.

As to the works being necessary for the using of the railway, North J. found that they were so, and the evidence as to this is all one way, and uncontradicted, and it was not suggested that the defendants by what they were doing were causing unnecessary damage.

Solicitors: *Pitman & Sons, for Emsley, Son & Smith, Leeds; Williamson, Hill & Co., for A. Kaye Butterworth, York.*

H. C. J.

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School Board—Statutory Powers—Purchase of Land by Agreement—Person injuriously affected—Elementary Education Act, 1870 (33 & 34 *Vict.* c. 75), ss. 19, 20—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), s. 68.

When a school board acquire land, whether by agreement or compulsion, for the purposes of the Elementary Education Act, 1870, and purchase with notice of a restrictive covenant to which the land was subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under s. 68 of the Lands Clauses Consolidation Act, 1845.

MOTION by the plaintiffs for an injunction to restrain the defendants, until judgment or further order, from proceeding with the erection of a school, which they had commenced building, in breach of a restrictive covenant contained in an indenture, dated October 28, 1889, and made between the plaintiffs of the one part and Samson Fox of the other part.

The plaintiffs were the trustees of the will of William Watson, deceased.

By a deed dated May 7, 1873, some land in Harrogate was conveyed to Watson in fee, and by the same deed Watson entered into a restrictive covenant with the grantors as to the use of the land thereby conveyed to him.

By his will dated March 17, 1883, Watson devised the land so conveyed to him to his trustees, upon trust for sale. Watson died on June 15, 1883.

By the deed dated October 28, 1889, the trustees of Watson's will conveyed to Samson Fox in fee a plot of land, which formed part of the land conveyed to their testator by the deed of May 7, 1873, subject to such of the covenants, restrictions, and reservations contained in that deed as might then affect the plot of land conveyed to Fox. And Fox covenanted with the trustees that no buildings (except bay-windows and porches) should without the consent in writing of the trustees be erected within thirty feet of the northern boundary, and that no noisy,

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noisome, or offensive trade or calling should be carried on upon the plot of land.

On March 8, 1894, Fox conveyed the plot of land comprised in the deed of October 28, 1889, to the defendant school board. The board purchased the plot of land for the purpose of erecting a school upon it. The purchase was made by voluntary agreement between Fox and the board, and the conveyance was made subject to all the restrictions to which the vendor was then subject.

The board commenced erecting a school upon the plot of land. The school buildings projected beyond the limit of thirty feet mentioned in the restrictive covenant by means of two bays or turrets containing windows, and it was alleged by the plaintiffs that this was a violation of that covenant.

This action was commenced to restrain the board from so building. The motion was heard before North J. on December 20, 1895.

Vernon Smith, Q.C., and *Curtis Price*, for the plaintiffs. The erection and carrying on of a board school would be a breach of the restrictive covenant. It may well be that if the board had taken the land under their compulsory powers they would not have been bound by the restrictive convenant, but they would have had to make compensation to the persons entitled to the benefit of the covenant. That, however, is not so where they have purchased the land by agreement. In such a case they stand in the same position as any other purchaser by agreement, and take only that interest which their vendor could convey to them. The board did not give the plaintiffs any notice to treat. Sects. 19 and 20 (1) of the Elementary Education Act, 1870,

(1) Sect. 19: "Every school board for the purpose of providing sufficient public school accommodation for their district, whether in obedience to any requisition or not, may provide, by building or otherwise, schoolhouses properly fitted up, and improve, enlarge, and fit up any schoolhouse provided by them, and supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any of such powers."

Sect. 20: "With respect to the purchase of land by school boards for the purposes of this Act, the following

which enable a school board to purchase "land and any right over land," and incorporate the Lands Clauses Consolidation Act, 1845, do not empower them to purchase or make compensation for the benefit of a restrictive covenant. A "right over land" applies to such a thing as an easement, not to a restrictive covenant, which merely prevents a particular mode of using land. Such a covenant is in the nature of an amenity. *Clark* v. *School Board for London* (1) was the case of an easement over land taken by a school board. In order to obtain compensation it would be necessary to prove damage. That might not be always possible in the case of a breach of a restrictive covenant: *Baily* v. *De Crespigny*. (2) No reported case is to be found deciding that a person who is entitled to the benefit of a restrictive covenant in relation to land can obtain compensation for breach of the covenant from a railway company or public body who take the land under their statutory powers: Browne and Theobald on Railways, 2nd ed. p. 177.

Swinfen Eady, Q.C., and *Micklem*, for the school board. The plaintiffs are not entitled to an injunction. The Elementary Education Act empowers the board to take land for public purposes. It is admitted that if the land had been taken compulsorily the board would have acquired it free from any easements or restrictions as to its use, subject, however, to their making compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, if that section applied. The law gives no remedy for the loss of a mere amenity. It can make no difference whether the board acquire the land compulsorily or by agreement. In the latter case the vendor could convey only

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provisions shall have effect (that is to say):

"(1.) The Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land:

"(2.) The school board, before putting in force any of the powers of the said Acts with respect to the purchase and taking of land otherwise than by agreement, shall" publish and serve certain notices.

(1) L. R. 9 Ch. 120.

(2) L. R. 4 Q. B. 180.

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such rights as he had, and, if he were bound by a restrictive covenant, he could only convey subject to that covenant. But the board could build on the land by virtue of their statutory powers and would be free from any restriction, and compensation under s. 68 would be the only remedy of any person who was injured by the building: *Baily* v. *De Crespigny*. (1) It does not very clearly appear from the report of *Clark* v. *School Board for London* (2) whether in that case the purchase was compulsory or voluntary; but the nature of the arguments rather implies that it was voluntary. *Duke of Bedford* v. *Dawson* (3) was an analogous case. When land is acquired by a public authority under their statutory powers for public purposes, whether it is acquired compulsorily or by agreement, they are entitled to use it for those purposes free from any restriction, but they must make compensation under s. 68 to persons who are injured.

Vernon Smith, Q.C., in reply. When land is proposed to be taken compulsorily by a school board, they are obliged by s. 20, sub-s. 2 (*a*), to publish a notice of the object for which they propose to take the land and the quantity of land they require; and then by sub-s. 4 the Education Department may direct a public inquiry to be held. Any person interested in the land would then be able to ascertain what kind of buildings the board proposed to erect on the land, and would have an opportunity of attending the public inquiry and objecting.

[NORTH J. Would the contractual right of an adjoining landowner be a proper subject-matter of such an inquiry?]

All the surrounding circumstances would have to be taken into account. Suppose the land had formed part of a large estate which had been sold in lots, subject to a restrictive covenant that only private dwelling-houses should be built upon them: would not the purchasers of those lots be entitled to be heard upon such an inquiry? Whereas, if the land were purchased by agreement, and the board's compulsory powers were afterwards put in force in respect of easements or restrictive covenants, the persons entitled to those rights would have no oppor-

(1) L. R. 4 Q. B. 180. (2) L. R. 9 Ch. 120.
(3) L. R. 20 Eq. 353.

tunity of being heard. A person who is entitled to the benefit of a covenant restricting the use of land is not an "owner" of the land within the Public Health Act, 1875: *Guardians of Tendring Union* v. *Dowton*. (1)

NORTH J. I cannot grant the injunction for which the plaintiffs ask. [His Lordship stated the facts, and continued:—]

The defendants are proceeding under the parliamentary powers contained in the Elementary Education Act. Their duty is to find the best site they can for the building which they require to erect, having regard to all the circumstances. Nothing can be clearer than the way in which Lord Selborne put the matter in his judgment in *Clark* v. *School Board for London*. (2) He said (3): "It seems to me that the Legislature, in authorizing the school board, for important public purposes, to exercise these large powers subject to the supervision and authority of the Department of the Privy Council for Education, meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them. Those duties require that the persons intrusted with them should provide what, in their honest judgment, would be proper and suitable accommodation for the instruction of the children to be educated in the buildings to be erected upon the land acquired by them. And, compulsory powers to take land for these public purposes being given, if they do not provide what a higher authority considers sufficient school accommodation, they may be required to provide more." That is, the board have compulsory powers to which they can resort if they like, and I think these remarks would have applied equally if the land had been purchased by voluntary agreement. But the reference by Lord Selborne to their having authority to exercise these powers, subject to the supervision and authority of the Department of the Privy Council for Education, leads me to think that in that case there must have been a compulsory and not a voluntary purchase. I infer that from these words of

(1) [1891] 3 Ch. 265.
(2) L. R. 9 Ch. 120.
(3) L. R. 9 Ch. 122.

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Lord Selborne, though there is nothing else in the report to shew whether the purchase was compulsory or not. In the present case the arrangement between the defendants and Fox for the purchase was voluntary, and it was not necessary to resort to the compulsory powers of the board. Now these powers are contained in ss. 19 and 20 of the Act of 1870. [His Lordship read s. 19.] Then, by s. 20, "With respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect." That clearly must mean the purchase of land under the Act in any way whatever. Then sub-s. 1 incorporates the whole of the Lands Clauses Act, 1845, and the Acts amending the same, except the provisions relating to access to the special Act; all the rest is incorporated. Then it says, "In construing those Acts for the purposes of this section the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land." Then, by sub-s. 2, "The school board, before putting in force any of the powers of the said Acts with respect to the purchase and taking of land otherwise than by agreement, shall" publish certain notices and take certain other proceedings—that is, in case of their taking land otherwise than by agreement.

It is clear from *Clark* v. *School Board for London* (1) that when land is taken compulsorily by a school board, a person who is entitled to an easement over the land (in that case it was an easement of light) cannot prevent the erection on the land of a building which may interfere with his ancient lights. His proper remedy is to apply for compensation by reason of his ancient lights being injuriously affected. I cannot see any difference in principle (of course there is a difference in form) between a case in which the right to light has been gained by statute or prescription and a case in which the right has been acquired by an express grant a year or two previously. If the remedy by compensation applies to an easement of light, as *Clark* v. *School Board for London* (1) decided that it did, when it was gained by prescription, I think it must equally apply when

(1) L. R. 9 Ch. 120.

the right to light has been acquired by express grant. I cannot see any difference between the one case and the other by reason of the manner in which the right has been acquired. Nor can I see any difference between a right to light or any other right in respect of the land which may be affected by the buildings that may be erected on it. In my opinion the principle which applies to an easement applies equally to the right which is created by a restrictive covenant.

If this had been a compulsory purchase, I think it is clear that the board could not have been prevented from building on the land in a manner at variance with the restrictive covenant.

Then, does it make any difference that the land was acquired by the board voluntarily and not by compulsion? I think not. Suppose that in the present case the defendants' right to build on the land had been acquired by the exercise of their compulsory powers as against Fox, it is clear that the plaintiffs would not have been served with any notice by the board. The plaintiffs would have had a right to enforce the restrictive covenant against Fox; but the compulsory powers of the board would have been exercised and carried through without any notice being given to the plaintiffs. Fox would have been compelled to sell to the board every right which he had in respect of the land, whether he would or not; but the plaintiffs would have been left outside the proceedings. If the vendor was competent to sell his whole interest, and was unwilling to sell it, he could have been compelled to do so. If, on the other hand, he had been willing to sell the land, but was unable to do so by reason of his being only a limited owner, the compulsory powers of the Act could have been put in force, and he, as such limited owner, on complying with the provisions of the Act, could have sold the land, and the plaintiffs would have been bound, though they were not parties to the proceedings. It was unnecessary here to have recourse to the provisions of the Lands Clauses Act for the case of a vendor who is a limited owner, inasmuch as this vendor was an owner in fee, and competent, therefore, to sell as large rights by voluntary agreement as he must have sold if recourse had been had to the compulsory powers. In neither

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case would the plaintiffs have been affected by the proceedings. It seems to me that the rights of the school board as against a person who can be compelled to sell to them, but who is willing to do so, are not less than they would have been if he had been unwilling to sell, but had been compelled to do so.

In *Baily* v. *De Crespigny* (1) there had been opposition by the vendor at first; but, after the purchase-money had been ascertained and some other steps taken, he had voluntarily executed a conveyance to the purchasers, without putting them to the trouble of executing a deed-poll adversely to him. It was pointed out by the Court that the vendor's concurrence, at any rate to that extent, did not make the case in any way the worse for him than it would have been had the transaction been compulsory throughout, and, if that is so when there is concurrence to some extent, I cannot see why it should not be equally so when there is entire concurrence by the vendor throughout. I do not see why a person who voluntarily concurs to some extent does not stand in exactly the same position as if he concurred throughout. I think, therefore, that the voluntary conveyance by the vendor in the present case had exactly the same effect as if he had refused to sell to the board, and had then been compelled by them to sell. In neither case would the plaintiffs have been parties to the proceedings or had notice of them. In either case the plaintiffs would stand outside, and I think their position would be the same whichever of the two courses was adopted.

Under these circumstances, I think the board are entitled to erect their buildings in such way as they may think best for the public benefit, and that they are not in any way bound by the restrictive covenant. The plaintiffs may be injuriously affected by what is done; but, if so, they will have the benefit of receiving a money compensation for that which is taken away from them. Under these circumstances, there is no reason why the building contemplated by the defendant school board, in the bonâ fide exercise of their powers, should not be completed. The motion must be refused.

W. L. C.

(1) L. R. 4 Q. B. 180.

The plaintiffs appealed. The appeal came on for hearing on January 29, 1896.

Vernon Smith, Q.C., and *Curtis Price*, for the plaintiffs. The turrets containing windows are not bay-windows within the exception in the covenant.

Assuming the covenant to have been violated, the Elementary Education Act, 1870, does not exempt the defendants from liability in an action for breach of covenant. Under s. 19 the defendants have power to buy by agreement, and in that case they have the same rights and liabilities as an ordinary landowner. Under s. 20 they are empowered to buy compulsorily, and then the Lands Clauses Act, 1845, applies. But it has no application to a voluntary purchase.

Further, s. 68 of the Lands Clauses Act is the last of a group of sections, commencing with s. 16, which is headed, "With respect to the purchase and taking of lands otherwise than by agreement." It is, therefore, confined to compulsory purchases; or, at least, to the purchase of lands which are defined within specified limits in the special Act of the undertakers, and which they have power to acquire by compulsion. In *Clark* v. *School Board for London* (1), it appears from the report in the *Law Times* that the land was acquired compulsorily, and in *Baily* v. *De Crespigny* (2) the proceedings were compulsory up to a certain point. *Ferrar* v. *Commissioners of Sewers of London* (3) shews that s. 68 of the Lands Clauses Act does not apply where the compulsory portion of the Act is not incorporated in the special Act. In the Act of 1870 no limits are defined within which the school board may exercise their powers, and for that reason s. 20 imposes upon them special restrictions as to the compulsory purchase of land; but, if the defendants are right, they may, if they can obtain a willing vendor, build a school on any site within their district, however injurious it may be to the rights of neighbouring landowners, and yet such landowners cannot be heard in opposition, and have no power to restrain the infringement of their rights. Sect. 19 of the Act of 1870

(1) L. R. 9 Ch. 120; 29 L. T. (N.S.) 903. (2) L. R. 4 Q. B. 180.
(3) L. R. 4 Ex. 227.

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provides for the voluntary purchase of "any land and any right over land"; but the decision of North J. comes to this: that in the case of a voluntary purchase of land, the land is acquired by agreement, and the rights of other people over the land are acquired without agreement. The right to the benefit of a restrictive covenant is a right for which no adequate compensation in money can be made, and being a mere amenity, it may be that the plaintiffs will get nothing under s. 68 of the Lands Clauses Act. (1)

Swinfen Eady, Q.C., and *Micklem*, for the defendants. There has been no breach.

Assuming a breach the plaintiffs' only remedy is compensation under s. 68 of the Lands Clauses Act.

By sub-s. 1 of s. 20 of the Act of 1870, the Lands Clauses Act is incorporated whether the purchase is voluntary or compulsory. Certain powers as to taking land by agreement are obtained under the Lands Clauses Act; but if the board desire to take lands compulsorily, then sub-s. 2 requires them to take certain preliminary steps. It is said that s. 68 of the Lands Clauses Act, by reason of the index prefixed to s. 16, is limited to taking land otherwise than by agreement; but it is settled that that section cannot be so restricted: *Hammersmith and City Ry. Co.* v. *Brand* (2); *Metropolitan Board of Works* v. *McCarthy*. (3)

[They also cited *London, Brighton and South Coast Ry. Co.* v. *Truman*. (4)]

Vernon Smith, Q.C., in reply.

LINDLEY L.J. stated the facts, and said that he would assume, without deciding, that the erection of the turrets or bays beyond the building-line was a breach of the covenant, and he continued as follows:—In order to determine the position of the school board we must look at the powers conferred upon them by the Elementary Education Act, 1870, ss. 19 and 20. Under s. 19 power is given to the school board to provide a building

(1) The appeal in *Emsley* v. *North Eastern Ry. Co.*, which is referred to in the judgment of Kay L.J., was argued before the opening of the respondents' case on this appeal.

(2) L. R. 4 H. L. 171.

(3) L. R. 7 H. L. 243.

(4) 11 App. Cas. 45.

for a schoolhouse, and to purchase and take on lease any land and any right over land. That alone of course would not answer the purposes of any public body with duties to discharge. There may be difficulties about buying the land. People may not be disposed to sell, or the people whose property the school board might want to buy may be tenants for life, or infants, or persons under some disability. Therefore, in order to give effect to that power to buy, something more is required—some power to compel people to sell, or some method of acquiring the property from the people who will not sell. Then s. 20 begins thus: "With respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect, that is to say." Pausing there for a moment, that does not say with respect to the purchase of land by school boards compulsorily "from people who will not sell." It says, "with respect to the purchase of land by school boards"—i.e., all purchases of land. [His Lordship then continued reading the section down to the end of clause 1.] Pausing there, what is there in point of language to exclude from the provisions of this Elementary Education Act the whole or any part of the Lands Clauses Consolidation Act, except that relating to the access to the special Act? If that section is read as we are asked to read it, as incorporating only the clauses relating to compulsory purchase, the whole machinery comes to a deadlock, and it is not consistent with the language. It is "With respect to the purchase of land by school boards, the Lands Clauses Consolidation Act, 1845, shall be read as incorporated with this Act," and there is sense in that. As was pointed out in argument, if that is not so, the school board cannot get land from tenants for life (perhaps it could under the Settled Lands Act, but it certainly could not when this Act was passed), nor can it get land from persons under disability, and so on. Therefore it is essential, to work out the objects of the Legislature in passing this Elementary Education Act, that the whole of the Lands Clauses Act, except that part to which I have referred, should be incorporated.

Then comes another series of provisions which modify and restrict the power of the school board to take land compulsorily

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under the Lands Clauses Act. Under the Lands Clauses Act a railway company can exercise their compulsory powers without any supervision of the Board of Trade or any other public office or functionary; but here the Legislature places a fetter upon the school board, and requires them, before permitting them to exercise their powers of compulsory purchase, to comply with certain conditions which are enumerated.

This interpretation of ss. 19 and 20 is consistent with every word that is used in them, and I should say that it is consistent with the obvious intention of the Legislature. Then what becomes of this case? We are asked to say that upon the true construction of ss. 19 and 20, and of the Lands Clauses Act, if the school board can take this land or any land by agreement, nobody who is injuriously affected can avail himself of s. 68 of the Lands Clauses Act. I cannot read these sections or the provisions of the Lands Clauses Act as resulting in any such injustice or absurdity. It is true that s. 68, which gives, not a power to the company to take land compulsorily, but a right to a person injured to be compensated, is found in a group of sections headed: "Purchase of lands otherwise than by agreement"; but upon reading the section itself, to my mind it is hopeless to contend that a person is not to be entitled to the benefit conferred on him by that section, if the company have bought land by agreement rather than by exercising their compulsory powers. There is no sense in such a contention as that, and whenever it has been advanced, as it once or twice has been in previous cases, it has always been rejected.

It is true, as Lord Cairns pointed out in *Hammersmith and City Ry. Co.* v. *Brand* (1), that the language of the Legislature is not quite happy; but when regard is had to the object of the section, it would be misreading the Lands Clauses Act if we were to hold that a person injuriously affected by the construction of the works could not have the benefit of s. 68 if the company had managed to acquire the land by agreement rather than by the exercise of their compulsory powers. I have not the slightest doubt myself that s. 68 properly applies to all

(1) L. R. 4 H. L. 171, 218.

cases of purchase by railway companies under their powers, and to all cases of purchase by school boards under the powers conferred upon them by this Act of 1870.

It follows that the school board are perfectly right in contending that an action for an injunction or damages is out of the question. If the plaintiffs can make out that they are injuriously affected, they will be entitled to compensation under s. 68 of the Lands Clauses Act. They are not in the position of a person who is in the enjoyment of some easement; but they have a right—a right conferred upon them by that covenant. What is its value in money is another matter. It is quite possible that in asking for compensation, and in putting into force the machinery for obtaining it, their damages may be assessed at nil; but if they can make out that they are damnified they are entitled to compensation under s. 68. That was North J.'s view, and that is my view. I think that his decision was correct, and that the appeal must be dismissed with costs.

KAY L.J. I am not satisfied that there has been any breach of either of the covenants in this case. But the question with regard to the remedy is by far the more important question, and for the purpose of my present judgment I will assume that there has been a breach of covenant, and that it was such a breach as that, if s. 68 of the Lands Clauses Act did not apply to the case, it would enable the plaintiffs to obtain an injunction. That they have incurred or will incur by what is being done, one farthing's worth of damages, I cannot understand. However, assume that, and assume that it is a case in which the Court would treat these covenants, or one of these covenants, as having been infringed, and that they would be entitled to an injunction: in my opinion the language of s. 68 applies.

Now the position of this school board is materially different from that of a railway company. It differs in two respects. In the first place they have no deposited plans or anything of that kind. The land which they may take they may take from time to time all over the country wherever their jurisdiction extends; and in the next place no time is limited within which

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they may exercise such power as the Legislature has given them.

By s. 19 of the Elementary Education Act, 1870, power is given to a school board to acquire land without any limit in point of time and without any description of those lands in any deposited plan, and that power clearly implies the power in this school board to acquire land by agreement with the owner. If the owner is able to sell, they may agree with him for the purchase; but then of course the Legislature had to remember that the land that they might want might be in the possession of a person who was a mere tenant for life, or might be owned by a lunatic or a person under some other disability. Therefore, in order to meet a case of that kind, it introduces the provisions for compulsory purchase in the Lands Clauses Act; but, again, it limits those powers of compulsory purchase by certain special provisions peculiar to school boards. The first part of s. 20 introduces the Lands Clauses Act without referring to the compulsory clauses at all, and says, "The Lands Clauses Act shall be incorporated with this Act." Very well; that is, "You must read in this Act amongst other sections s. 68 of the Lands Clauses Act." I fail to see upon these ss. 19 and 20 any indication that s. 68 is only to be read with reference to land which the school board may acquire by way of compulsory purchase. Sect. 68 is to be read as part of this Act, which gives to a school board express powers of purchasing, either by agreement or by way of compulsory purchase, any land which they may think proper to purchase at any time.

In this case the school board have acquired by agreement—I should rather say, without the exercise of any compulsory powers—the land upon which they are now building a school. They had notice that the vendor of the land from whom they purchased was bound by a specific covenant not to build beyond a certain line, except any bay-windows which might project beyond that line. They bought with express notice of that covenant, and they bought subject, as the conveyance by the vendor to them expresses it, to all the restrictions to which he was subject when he sold. Therefore they would be bound—not at law, because the covenant would not run with the land,

but in equity—by that restrictive covenant of which they had express notice. But the question arises whether s. 68 of the Lands Clauses Act does not apply. That section begins thus: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for"—that is one thing—"or injuriously affected by, the execution of the works," then the section applies.

In this case the plaintiffs allege that they are injuriously affected by the erection of a building having projections, which they say are breaches of the restrictive covenant, of which the school board had notice. But, looking at this s. 68 by itself, why should the words "injuriously affected by the execution of the works," even when applied to a railway company, be confined to works upon land which has been compulsorily taken? There is no reason on the face of the section itself why it should be so limited. The only reason which has been advanced in the argument is this, that that section is one, the last, of a group of sections which is headed, "With respect to the purchase and taking of lands otherwise than by agreement." Now Lord Cairns, in *Hammersmith and City Ry. Co.* v. *Brand* (1), expressly pointed out that those words heading the group of sections did not confine those sections to the purchase of land otherwise than by agreement. There are many things in the sections which could not possibly be so limited, and, with regard to this provision in s. 68 referring to the execution of works injuriously affecting other land, it would, to my mind, be insensible to say, even in the case of a railway company which had bought land by agreement, that it did not apply to the execution of works upon the land so acquired, because the land had not been compulsorily taken. What kind of reason would there be in that? What limitation is there in the section itself? There is none, unless the section is to be confined by that heading which precedes the 16th section, the first in the group of which this s. 68 is the last. Therefore, it seems to me that, even if this were a railway company and they were executing works which would injuriously affect another landowner, s. 68 would apply, and that

(1) L. R. 4 H. L. 171.

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other landowner would not be entitled to obtain an injunction, but would be bound to apply for compensation under this s. 68.

I am not going to discuss the point raised in *Emsley* v. *North Eastern Ry. Co.* (1) as to whether the result would be the same if a railway company were executing works on land which they had acquired by agreement after the time limited by the statute for executing the works. In this case that point does not arise, because no limit of time is imposed by this Act of Parliament on the school board for the building of schools, and they are building these schools under their statutory powers. They are exercising their statutory powers by building their schools upon lands which they purchased by agreement, and the only ground for saying that s. 68 does not apply is that the land was purchased by agreement and not compulsorily. To my mind that ground is fallacious, and whether the land was purchased by agreement, as in this case, or under the exercise of compulsory powers, I think makes no difference whatever. If they are using the land under their statutory powers, s. 68 is incorporated in their Act, and applies to the case, and the only remedy of the landowner who says his land is injuriously affected thereby is to obtain compensation under s. 68.

I think that this is consistent with what was decided in *Clark* v. *School Board for London*. (2) The only other case to which I will refer is *Ferrar* v. *Commissioners of Sewers of London*. (3) There the City of London Sewers Act of 1848 incorporated the Lands Clauses Act, but s. 3 expressly excluded the operation of those provisions of the Lands Clauses Act which related to the purchase and taking of land otherwise than by agreement. It was held, because those words were the descriptive heading of ss. 16 to 68 inclusive, that all those sections were excluded. That might be quite right, because the reference in s. 3 of that particular Act to those provisions by the heading under which those sections are comprised in the Lands Clauses Act itself was a compendious description of that group of sections. It was, therefore, inevitable that the Court should come to the conclusion that s. 68, which was one of the

(1) Ante, p. 418. (2) L. R. 9 Ch. 120.
(3) L. R. 4 Ex. 227.

sections of that group, was excluded. That in no way touches the question which we have to decide in this case; and I think, therefore, that the learned judge was quite right in holding that the remedy in this case by way of injunction is entirely destroyed by the statute, and that the execution of these works, if they injuriously affect the plaintiffs, only enables them to obtain compensation under s. 68, which in my opinion exactly applies to the case which has occurred.

A. L. SMITH L.J. I am of opinion that the judgment of North J. must be affirmed.

This is an application for an injunction to restrain the school board for Harrogate from building school premises on land which they have acquired by purchase from the freeholders by agreement, and the application is based upon the fact that the school board purchased that land with express notice of two restrictive covenants. One was that they were not to erect upon a certain part of the land any building other than bay-windows. The other was that they were not to carry on a noisy, noisome, or offensive calling; and the plaintiffs allege that the school board are building in contravention of the covenant by which they are bound, and are about to carry on in their building or outside their building, when it is erected, a noisy calling. For the purposes of this point I will assume, though I have no means to decide it, that the plaintiffs make out a case of breach of one or other of those covenants. There is considerable doubt about it, but for the purposes of to-day I assume it to be made out.

Now the answer of the defendants is the shortest possible answer. They say that they are authorized by statute to do what they are doing. That is their answer to the injunction, and if the defendants can make that out there can be no doubt that no injunction ought to go. That brings me to the Act to which the school board refer as giving them authority to do what they are doing and proposing to do. The Act they refer to is the Act of 1870 (Mr. Forster's Act), which started school boards, and started the whole system of elementary education on the basis on which it now is. In that Act will be

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found at the beginning of s. 14 the powers which are given to school boards as to managing and maintaining schools. Passing on from s. 14 to s. 19, we find that that section gives them power to purchase land or take on lease land or any right over land for the purpose of carrying on the school, building schools thereon, and for carrying on the purposes of the Act.

Now, if the Act had stopped there, the school board would have had a statutory right to purchase by agreement, and where they could get persons to sell lands to them whereon to build schools, they would have been entitled to take it. But the matter does not rest on s. 19, because the next section is very pertinent to the case which the school board set up. Sect. 20 enacts: "With respect to the purchase of land by school boards" —the right to purchase which had been granted to them by s. 19—"for the purposes of this Act the following provisions shall have effect." Nothing can be larger than that. Then all the provisions of the Lands Clauses Act, except the provisions relating to the access to the special Act, which is a group of sections in the Lands Clauses Act, are incorporated in this Act of 1870, so that when the school board purchase land for the purpose of building schools thereon, they are to have the benefit of the powers conferred by the Lands Clauses Act. Pausing there, where is there anything to shew that the authority of the Lands Clauses Act is only granted to the school board when they purchase under compulsion? Whether they purchase under compulsion or whether they purchase voluntarily, in my judgment the true construction of this section is that the school board are to have the benefit of the Lands Clauses Act, with the exception that I have already mentioned.

But then the section goes on further. The first part says: "When you can get a willing vendor, and you become a willing purchaser, then you are to have the benefit of the Lands Clauses Consolidation Act; but if you (I am now coming to sub-s, 2 of s. 20) are going to force an unwilling vendor to sell to you, that is if you are going to buy compulsorily from him, although he does not want to sell, then further provisions than those which are to be found in the Lands Clauses Consolidation Act are to apply"; and those provisions will be found in the latter

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part of this sub-s. 2. I think the meaning of the statute is plain.

But then it was argued if that be so, and if the injunction cannot go in the present case, and if the plaintiffs cannot sue for the injuries they have sustained, they have no remedy, because it is said s. 68 of the Lands Clauses Consolidation Act, which gives them a remedy by way of proceedings for compensation, does not apply. Lindley L.J. and Kay L.J. have covered that ground; and, in addition to what they have said, it is only necessary to refer to the speech of Lord Cairns in *Hammersmith and City Ry. Co.* v. *Brand* (1), and to the speeches of the noble lords in *Metropolitan Board of Works* v. *McCarthy* (2), to see that there is no ground for that allegation. It seems to me, whether land is taken by the school board voluntarily or by compulsion, if a man is injuriously affected by works executed upon the land so taken, the injured party can proceed by way of compensation under s. 68, and that is what is provided for by this statute.

I wish to point out that there is no confiscation in the statute at all. The Legislature has said this: "You the school board may take by compulsion, but, whether you take voluntarily or by compulsion, if another man is injuriously affected by reason of the works which you are erecting on land which you have taken either one way or the other, you are to pay him for it by means of compensation." Here clearly there could be no injunction, and I think the appeal ought to be dismissed.

Solicitors: *Foyer & Hordern, for Ward & Sons, Leeds; Corbin & Greener, for E. Raworth, Harrogate.*

(1) L. R. 4 H. L. 171. (2) L. R. 7 H. L. 243.

H. C. J.

C. A. 1895 Dec. 6, 7. 1896 Feb. 3.

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[1895 J. 257.]

Company—Deceased Shareholder—Increase of Capital—Allotment of New Shares—Option—Legal Personal Representative—"Member"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Sched. I., Table A, Art.* 27—*Notice—Offer of New Shares—Posting to Registered Address.*

"Member" in art. 27 of Table A to the Companies Act, 1862—which provides that on the increase of the capital of a company the new shares shall be offered to the "members" in proportion to their existing shares—includes a deceased member so long as his name is on the register.

Thus, where, in the case of a company regulated by Table A, new shares had been created by special resolution in the lifetime of a member, but were not actually offered to the members of the company until after his death:—

Held, that the legal personal representative of the deceased member, whose name still remained on the register, could require an allotment of the shares which the latter would, if living, have been entitled to have offered him, these shares not yet having been disposed of by the company; but, *quære*, as to the title of the legal personal representative to the shares, if, as was not the case, the company had sent by post a letter containing the offer directed to him at the registered address of the deceased member, or directed to the place of abode or business of the representative or his solicitor, and, not having received an answer applying for the shares within the time limited by the letter, had proceeded to dispose of them otherwise.

Where one of the articles of association of a limited company prescribes a particular mode of allotment of new shares, *quære*, whether it is competent for the company by special resolution to sanction a different mode of allotment without having first passed a special resolution duly altering that article.

THIS action was brought by the plaintiff Mrs. Lucy Constance James, widow, as executrix of her deceased husband, Harry Berkeley James, to establish her right to fifty shares of 10*l.* each in the defendant company, the Buena Ventura Nitrate Grounds Syndicate, Limited.

The company was incorporated in 1889 under the Companies Acts, 1862 to 1890 (1), with a nominal capital of 10,000*l.* in 100 shares of 100*l.* each.

By the articles of association it was provided that, with

(1) See the Short Titles Act, 1892, s. 1, sub-s. 3.

certain modifications, the regulations contained in Table A in Sched. I. to the Companies Act, 1862, should apply to the company. Among the regulations of Table A thus made applicable were arts. 26 to 28 inclusive, relating to the increase of capital.

Art. 27 of Table A is as follows:—

"Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company."

In place of art. 72 of Table A the articles of association provided (amongst other things) that, whenever the directors thought it desirable that any part of the profits of the company should be divided or distributed "between the members" by way of dividend, they might recommend the payment thereof accordingly.

By a special resolution duly passed and confirmed at meetings of the company held respectively on July 13 and 28, 1891, it was resolved "That the capital of the company be increased to 15,000*l.* by the creation of fifty new shares of 100*l.* each, and that, in pursuance of art. 26 of Table A appended to the Companies Act, 1862, the directors be and they are hereby authorized to issue such shares."

At the time that resolution was passed Harry Berkeley James was the registered holder of ten fully paid-up shares in the original capital of the company. On July 22, 1892, before the new shares were actually issued under that resolution or any offer of them was made, Mr. James died, having by his will appointed his widow, the plaintiff, his executrix. She proved the will on March 3, 1893.

By a special resolution passed and confirmed at meetings of

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the company held respectively on March 6 and 24, 1893, the following clause was added to the articles of association of the company:—

"Sub-division of shares. The company may from time to time by special resolution divide its capital by sub-division of its shares, or any of them, into shares of a smaller amount than is fixed by the memorandum of association of the company."

The following further special resolution was passed and confirmed respectively by the company on April 21 and May 11, 1893:—

"That the share capital of the company, which now consists of shares of 100*l.*, be sub-divided into shares of 10*l.* each, and that each of the 100 existing fully paid-up shares of 100*l.* each be divided into ten fully paid-up shares of 10*l.* each, and that each of the fifty existing shares of 100*l.* each upon which nothing has as yet been paid, be divided into ten unpaid shares of 10*l.* each; and that such last-mentioned shares be offered for allotment at par to the members of the company who, at the date of the confirmation of this resolution, shall be the registered holders of the fully paid-up shares of the company, and in the proportion of one unpaid share for every two fully paid-up shares; and that any shares which may not be capable of being so allotted, or which may not, within a time to be prescribed by the directors, be accepted by the members holding fully paid-up shares, be allotted to such persons in such manner and on such conditions as the directors may from time to time prescribe."

At the date of the confirmation of that resolution the name of Mr. James still appeared upon the register of members as the holder of ten fully paid-up original shares: so that, had he then been alive, he would have been entitled to have had offered to him, in respect of that holding, five 100*l.* shares out of the new capital, or fifty of the 10*l.* shares into which they had been sub-divided.

On April 21, 1893, at a meeting of the directors of the company, the secretary was instructed to send a circular to the shareholders, asking them to state immediately, in anticipation of the resolution to divide the shares being confirmed at the

meeting of the company to be held on May 11, whether they would wish to subscribe for the new shares, which would be offered first to them for the space of ten days—namely, till May 21; and requesting them to state within that period if they wished to take the shares to which they were entitled, informing them at the same time that, if by May 21 they had not applied for the shares, the directors would proceed to allot them as they thought right. Accordingly on May 11 a circular letter to that effect was sent by the secretary to the members.

At that time the death of Mr. James had become known to the directors, and accordingly one of such circulars was sent addressed to "The Executor of the late H. B. James, care of San Jorge Nitrate Company, Limited, 23, Leadenhall Street"; but the circular was never received by, or came to the knowledge of, the plaintiff, owing, it appeared, to the fact that the registered address of Mr. James in the books of the defendant company was "9, Gracechurch Street," which had once been the address of the San Jorge Nitrate Company, a company in which he was a shareholder, and who had been in the habit of receiving letters for him at that address; but prior to May, 1893, they had changed their offices to 23, Leadenhall Street. It appeared, however, that the company might before the resolution of April, 1893, have ascertained the correct address of Mr. James's executrix, for they had been in communication with her solicitor upon some other matters relating to the shares.

All the shareholders who had received the circulars applied for the new shares, the option to take them having become of considerable value; and at a meeting of the directors of the defendant company held on May 24, 1893, a resolution was passed to allot 450 out of the 500 new 10*l.* shares, but to defer the disposal of the remaining shares unapplied for, being the fifty 10*l.* shares to which Mr. James would, if living, have been entitled.

Although Mr. James's will had been proved as far back as March, 1893, the probate was not produced to the secretary of the company until December, 1894, the delay being accounted

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for by the circumstance that it had been necessary to send out the probate to the Argentine Republic.

In May, 1894, the plaintiff for the first time heard that there had been or was about to be an allotment of new shares, and at once applied to the directors for the new shares which she claimed to be entitled to have allotted to her in right of her deceased husband; and on their refusing to recognise her claim she issued the writ in this action against the company, claiming a declaration that by virtue of the special resolution passed and confirmed on April 21 and May 11, 1893, she, as the legal personal representative of her deceased husband, was entitled to an allotment at par of fifty of the 500 shares of 10*l.* each in the capital of the company directed to be offered for allotment by that special resolution; and an injunction restraining the company and its directors from allotting or otherwise disposing of the 500 shares without allotting to the plaintiff or her nominees fifty of those shares.

On August 2, 1895, the plaintiff moved before Chitty J. for an injunction in the terms claimed by the writ; but the learned judge dismissed the motion, holding that the plaintiff was not a "member" of the company within the meaning of art. 27 of Table A, and was not entitled to an allotment of new shares as her deceased husband's legal personal representative.

The plaintiff appealed.

Byrne, Q.C., and *R. J. Parker*, for the plaintiff. The right of Mr. James to take up the new shares was vested in him at his death by virtue of the special resolution of 1891 and art. 27 of Table A; and it was beyond the powers of the company by the special resolution of April, 1893, to take away this vested interest without specifically altering the articles of association for the purpose: *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*. (1)

[LORD HERSCHELL. It does not follow that, because a company may by special resolution alter its articles, it can do something inconsistent with the articles without first altering them.]

(1) 23 Ch. D. 1.

But the object of the subsequent resolution was merely to give effect to the first; and the fact that the shares which Mr. James would have been entitled to take up had he lived were never allotted shews that the company itself took this view of the matter.

Chitty J. thought that a dead man could not be a member of a company; but, generally speaking, the estate of a deceased member is entitled to the privileges and subject to the liabilities of membership: *Baird's Case* (1); *New Zealand Gold Extraction Co.* v. *Peacock*. (2)

The plaintiff is not deprived of her right to allotment by the notice of May, 1893, which never reached her. There was no proper delivery of the notice. Here the company knew that Mr. James was dead, as evidenced by the fact that the notice was addressed to his executor, and the notice was not sent to his registered address. Those two circumstances distinguish this case from *New Zealand Gold Extraction Co.* v. *Peacock*. (2)

The option to take shares survives to the plaintiff as the representative of her deceased husband, and she is entitled to have the shares allotted to her.

Farwell, Q.C., and *Methold*, for the defendant company. The company having, under art. 27 of Table A, the power to increase its capital and to issue new shares, it was competent for them by any subsequent resolution to regulate the mode in which that power should be exercised, and it was unnecessary for them to alter their articles for that purpose: *Campbell's Case*. (3) The distinction between this case and *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (4) is that in that case—which related to the removal of directors—there was no power either inherent in the company itself, or under its articles, to remove its directors; and it was held that, in the absence of any express power for that purpose in the articles, it was necessary for the company first to alter the articles by special resolution so as to give the power, and then the removal could be effected by a subsequent special resolution exercising that power. But in the present case the company had already, by its articles, the

(1) L. R. 5 Ch. 725, 735.
(2) [1894] 1 Q. B. 622.
(3) L. R. 9 Ch. 1.
(4) 23 Ch. D. 1.

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power of issuing new shares, and therefore an alteration of the articles for that purpose or for regulating the mode of issue was unnecessary.

[LORD HERSCHELL. A similar point to that which arises for decision in this case was raised in *Bombay Burmah Trading Corporation* v. *Smith*. (1) There shares were allotted to A. on the terms that he, his executors and administrators, should be entitled to a preferential dividend. A. died, and therefore could not receive the dividend, and his executors were not on the register, but his name still remained. It was held that his executors were nevertheless entitled to the dividend.]

The question is whether Mrs. James is a "member" of the company within the meaning of art. 27 and the resolution of April, 1893. We submit not. An executor of a deceased member is not a member: *In re Bowling and Welby's Contract*. (2) Either under the resolution or under art. 27 the allotment was to be made to a living, not to a dead, person. "Member" implies, primâ facie, a living person; and art. 27 evidently contemplates only living persons: for instance, the "meeting" is to be one of living persons, namely, persons on the register.

[LORD HERSCHELL. Would it not be reasonable to say that the burdens and the privileges of members pass to their legal personal representatives?]

In this case there are acts to be done which can only be done by a living person, that person being on the register, namely, an election or option to take or not to take shares, followed by an intimation of his decision.

At all events, the moment the company received notice of Mr. James's death he ceased to be a member: *New Zealand Gold Extraction Co.* v. *Peacock*. (3)

Then, even assuming that the plaintiff, as Mr. James's executrix, is a "member" within the resolution of April, 1893, the time limited by the directors' notice giving the option has passed. Whether the notice was actually delivered or not is immaterial; addressing and posting it were sufficient: *Henthorn* v. *Fraser*. (4)

(1) L. R. 21 Ind. Ap. 139.
(2) [1895] 1 Ch. 663, 670.
(3) [1894] 1 Q. B. 622, 632.
(4) [1892] 2 Ch. 27.

[RIGBY L.J. That assumes that the notice was sent to the right address.]

We shew that we sent the notice to the best address we could get. Art. 27 of Table A is expressly intended to meet such a case as this. It means that if the notice giving the option is not received within a limited time the company may dispose of the shares for its own benefit.

Byrne, Q.C., in reply. Mr. James was undoubtedly a member at the date of the resolution of 1891, and to take away from him that accrued right—a right created by art. 27, and by that resolution which was passed under it—it was necessary for the company to pass a resolution altering their articles, by giving them power to do so, and then to pass another resolution exercising that power. A company cannot by a mere resolution alter the destination of shares.

Cur. adv vult.

Feb. 3. LORD HERSCHELL, after reading art. 27 of Table A, and also the special resolution of 1891, authorizing an increase of capital by the creation of the new shares, said :—The effect of art. 27 was to entitle Mr. James, or the person who should at the time of the issue thereof be his successor in title to the ten original shares, to an offer of his proportion of the new shares. [His Lordship then read the special resolution of March, 1893, by which a clause authorizing a sub-division of shares was added to the articles of association, and also the subsequent special resolution of April, 1893, for sub-division of shares, and continued :—]

A good deal of argument was addressed to us on the question whether this resolution of April, 1893, sanctioned a different allotment of the shares from that provided for by art. 27 ; and, if so, whether it was competent by a special resolution to sanction a departure from the provisions of art. 27 without having first by a special resolution duly altered that article. I am not satisfied that it would be competent for the company thus to act. It is unnecessary, however, to decide the point, as I do not think that the resolution of April, 1893, prescribes any different mode of allotment from that provided for by art. 27.

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The words used in the resolution—"the members of the company who, at the date of the confirmation of this resolution, shall be the registered holders of the fully paid-up shares of the company"—appear to me aptly to describe the members entitled to an offer of the shares under the resolution sanctioning the increase of capital when read with art. 27. The words cover the persons who were members at the time the resolution for an increase of capital was passed, and any persons who at the time of its issue were the successors in title of such members. [His Lordship then stated the other facts of the case, and continued:]

It is no doubt the fact that, strictly speaking, although Mr. James's name was, at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word "member," as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living. The article, for example, which in the case of this company is substituted for art. 72 of Table A authorizes the directors to distribute the profits of the company "between the members" by way of dividend. It cannot be doubted that they would be warranted in paying the proportionate share of the profits to the representative of a deceased member, although the word "member" only is used, or that such representative would be entitled to claim that dividend. For this purpose the deceased member must still be regarded as a member within the meaning of the article. In a somewhat similar case the late Lord Justice James said "the estate is the member." This is, of course, a metaphorical expression, but it sufficiently indicates the legal situation of the parties.

Again, where a liability arises with respect to the shares—as, for example, where a call is made on the "members"—it seems equally free from doubt that the liability attaches to the estate of the deceased member, and must be discharged by his representative, even though, being deceased, he is no longer, strictly speaking, a member of the company. Other instances might be cited where the articles require this effect to be given to the

use of the word "member," but those I have given will suffice. I can see no sufficient reason why the estate of a deceased member should be subject to the burdens of membership and should not have every pecuniary benefit accruing to the shares in respect of which he is registered.

It is said that there may be a greater difficulty, where the benefit is of the nature of an offer to be made to the holder of shares, in making that offer to the legal representative of a member than to the member himself. But, even if this be so, I do not think it is a sufficient reason for denying to the estate of the deceased member an advantage which is offered to all the other persons who are members of the company whilst continuing to hold that estate liable to all the burdens attaching to the shares registered in his name. In the present case the offer of the shares was to remain open to the shareholders entitled to an allotment for ten days, if they applied for an allotment within that time. The notice conveying the offer was not sent to the registered address of the deceased member. Even if this would have been sufficient, had no better means of communication with his representative been known, I am not satisfied that it would have sufficed where, as in this case, the company had, prior to the date of the resolution of April, 1893, been in communication with the solicitor of the executrix with reference to other matters relating to the shares of the deceased. It is not necessary to decide what would have been the rights of the parties supposing the company had sent by post a letter containing the offer directed to the representative of the deceased at his registered address, or directed to the place of abode or business of such representative or her solicitor, and, not having received an answer applying for the shares within the time limited, had proceeded to dispose of them otherwise. In the present case the shares are still at their disposal, and I do not see that they have in any way acted to their prejudice on the assumption that the shares would not be applied for.

For the reasons I have given I think the plaintiff was entitled to have the offer of shares, which was made to the members of the company, made to her also. As soon as she became aware

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of this right she elected to exercise it; and I think that, the shares not having been in any way disposed of by the directors, they were bound to allot them accordingly.

RIGBY L.J., after stating that the written judgment he was about to deliver had been seen and approved by A. L. Smith L.J., and was to be taken as the judgment of that learned Lord Justice as well as of himself, proceeded to read art. 27 of Table A, the resolution of 1891—which his Lordship said operated as a sufficient authority to the directors to issue, without any further resolution of the company, the new shares—and the resolution of April, 1893. He then continued:—

It will be seen that this resolution of April, 1893, is in no sense a resolution sanctioning, within the meaning of art. 27, the increase of capital; nor does it purport upon the face of it to alter art. 27. This resolution, however, is not necessarily inconsistent with art. 27. The registered holders of shares at the date of the confirmation of it must necessarily have been the same persons as, or successors in title of, the persons who were members when the resolution sanctioning the increase of capital became operative. Giving the same meaning to the word "members" in each resolution, the persons indicated as being entitled to an option would be the same. But even if this were not so, no majority of the shareholders, even by special resolution purporting to alter the regulations of the company, could retrospectively affect, to the prejudice of non-consenting owners of paid-up shares, the rights already existing under art. 27. [His Lordship then stated the other facts of the case, and continued:—]

The real question is whether the provision of art. 27 of Table A, for offering the new shares to "members," is intended to be confined to members in the stricter sense of the word, or whether it may not include the representatives of deceased members.

Speaking generally, the executors of a deceased member of a limited company as representing his estate are entitled to all the profits and advantages attaching to the shares belonging to their testator, and subject to all the incidental liabilities, although

in terms such profits, advantages, and liabilities would seem to attach to members only.

Thus, under art. 72 of Table A, which provides that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares, it would be difficult to hold that the estate of a deceased member, and his executors as representing his estate, are not entitled to a proper proportion of dividend, though the executors may not be themselves registered members.

So it could hardly be contended that under art. 4, providing that the directors may make calls upon the members, the estate of the deceased member, and his executors as representing that estate, are not liable to bear calls made after his death, so long as his share remains untransferred.

The liability for calls exists notwithstanding the fact that the required notice cannot effectually be given to a dead man, because it may be given to his representatives; though, if the company is not aware of his death, notice served at his registered address is sufficient when the articles provide for such service upon members: *New Zealand Gold Extraction Co.* v. *Peacock.* (1)

In all these cases the result is arrived at by treating the word "member" as including a deceased member, so long as his name is on the register; or, what comes to the same thing, treating the estate of the deceased member as being a member for the purpose both of profit and of liability: *Baird's Case.* (2)

In my judgment, a similar construction should be applied to art. 27 of Table A, with the result that the estate of Mr. James, as represented by his executrix, who is now registered owner of his paid-up shares, is entitled to an allotment of the fifty new 10*l.* shares reserved in May, 1893.

The main argument against this construction arises from the possible inconvenience to the company occasioned by delay in communicating with the personal representatives of deceased members. There may be cases in which it would be a hardship on a company not to be able to dispose of shares which would

(1) [1894] 1 Q. B. 622. (2) L. R. 5 Ch. 725.

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have gone to the estate of a deceased member where loss would arise from postponing the allotment; but no such case arises here. It would be quite easy to provide for such cases when sanctioning the increase of capital; and the mere fact that such an inconvenience may arise does not appear to me to afford a sufficient reason for construing art. 27 in such a manner as to produce inequality instead of equality among the holders of shares.

Their Lordships accordingly allowed the appeal, the hearing of which was, by consent, treated as the trial of the action.

Solicitors: *Parker, Garrett, & Parker, for F. F. Clarke, Walsall; Budd, Johnsons, & Jecks.*

G. I. F. C.

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In re RAY (A PERSON OF UNSOUND MIND).

Lunacy—Settled Estate—Lunatic Tenant for Life—Sale of Lunatic's Estate under Settled Land Acts—Conveyance "as Beneficial Owner"—Covenants for Title by Committee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 4, 20, 55, 62—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 120, 122, 124.

Sect. 124 of the Lunacy Act, 1890, enabling the committee of a lunatic on his behalf to execute and do all such assurances and things for giving effect to any order under the Act as the judge directs, must be construed as giving the Court jurisdiction to authorize a committee who is selling the lunatic's property under an order in that behalf, not only to convey the same on his behalf, but also on his behalf to enter into with the purchaser the covenants usual and proper in such a conveyance, including the ordinary covenants for title.

In re Fox (33 Ch. D. 37) is not a decision that in no case can the Court authorize the committee of a lunatic to enter into any covenants on his behalf.

H. R. RAY, a lunatic so found by inquisition, was, under the will of H. B. Ray, tenant for life in possession of an undivided moiety of an estate in the county of York; and the Hon. E. A. Fitzroy was absolutely entitled to the other undivided moiety thereof. There were trustees of the estate settled

by will of H. B. Ray for the purposes of the Settled Land Acts; and H. B. Ray had himself acquired it by purchase.

On October 30, 1895, a provisional agreement for the sale of a portion of this estate was entered into between H. R. Ray (acting by his committee) and the Hon. E. A. Fitzroy as vendors of the one part, and an intending purchaser of the other part, whereby it was agreed that, subject to the sanction of the judge in Lunacy, the vendors should sell and the intending purchaser should purchase the hereditaments therein described, and the inheritance thereof in fee simple in possession free from incumbrances at the price of 2931*l.* 17*s.* 4*d.* The agreement provided in clause 7 that the vendors should "on payment of the purchase-money execute a proper assurance of the premises to the purchaser"; and clause 8 was as follows: "8. The said H. R. Ray sells as tenant for life under the powers of the Settled Land Acts and shall not be required to enter into any covenants for title other than those implied by his conveying as beneficial owner, subject to a proviso that so far as regards the remainder expectant on his life estate and the title to and further assurance of the property after his death, his implied covenants shall not extend to the acts or defaults of any person other than himself and his own heirs and persons claiming or to claim under or in trust for him or them." The agreement also provided that, upon the sanction of the judge in Lunacy being given to the contract, H. R. Ray should forthwith give notice to the trustees of the will of his intention to sell the premises as required by the Settled Land Acts.

Upon a summons in that behalf presented by the committee, this provisional agreement was approved by Master Maclean; but, upon coming before the Lords Justices for confirmation, the case of *In re Fox* (1) was brought to the notice of one of their Lordships, and as he felt a doubt whether, having regard to that decision, a lunatic would be bound by any covenants for title entered into by his committee on his behalf, the summons for the confirmation of the agreement was now adjourned into court.

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Crackanthorpe, Q.C., and *Borthwick*, in support of the summons. Under the 8th clause of the provisional agreement, H. R. Ray, as tenant for life, is only to be required to enter into such covenants as are implied by his conveying "as beneficial owner," i.e., covenants for quiet enjoyment, freedom from incumbrance, and further assurance: see Conveyancing Act, 1881, s. 7, sub-s. 1 (A). Moreover, he derives his title from a testator who acquired title by purchase for value, and as regards the remainder expectant upon the determination of his life estate his implied covenants do not extend beyond his own acts and those of persons claiming under him. The only covenants, therefore, which are required of him are covenants as to his own acts and the acts of his testator that his estate is a good life estate. Without these covenants the purchaser refuses to complete, and the real question is whether the Court has jurisdiction to authorize the committee of the lunatic to enter into these covenants on his behalf. The Court has undoubted jurisdiction to authorize the committee of a lunatic to sell his estate, and it would be strange if it could not also authorize the committee to do what is necessary to carry out the sale. In that case the estate of a lunatic would be at a singular disadvantage as compared with the estate of any other vendor, for if the committee cannot covenant the lunatic cannot sell, neither in this particular case could the owner of the other moiety do so. The statutory provisions bearing upon the question are the Settled Land Act, 1882, the Lunacy Act, 1890, and the Lands Clauses Consolidation Act, 1845, and the general result of those enactments is to empower the committee of a lunatic to do all the lunatic himself could have done had he remained of sound mind. In the Act of 1882, s. 3 empowers a tenant for life to sell; s. 4 requires every sale to be at the best price; s. 20 enables the tenant for life to convey; s. 55, sub-s. 2, empowers him to "execute make and do all deeds, instruments, and things necessary or proper" in the exercise of his power of sale; and s. 62, where the tenant for life is a lunatic, enables his committee, under the order of the Court, to exercise the powers of a tenant for life under the Act. Under this Act, therefore, the power to enter into the covenants necessary and proper to the

exercise of a power of sale by the committee of a lunatic is inferentially implied. Coming to the Act of 1890, s. 120 gives the judge jurisdiction to authorize the committee to sell any property belonging to the lunatic; s. 122, in defining the extent of the leasing power, provides (sub-s. 2) that leases on behalf of a lunatic "may be . . . . . subject to such . . . . covenants . . . . as the judge approves"; and s. 124 enacts that the committee "shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly." An assurance without the usual covenants for title would be defective; and here again the requisite authority as to such covenants must be inferred. Further, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in s. 7, which enables parties under disability to sell and convey "and to enter into all necessary agreements for that purpose," empowers all committees of lunatics so to do on behalf of the lunatics of whom they are the committees "to the same extent as" such lunatics could have done if they had been under no disability.

The view which has been taken by conveyancers as to the powers of committees appears from the introduction of covenants by a committee into a precedent of an assignment by him of his lunatic's leasehold, and from the notes thereto in Davidson's Prec. in Conv., 4th ed. vol. ii. pt. i. p. 612.

The difficulty upon the present occasion has no doubt arisen from the case of *In re Fox*. (1) But what the Court was asked to do in that case was to sanction a covenant by the committee with reference to a debt not of the lunatic, but of another person; and we submit that the observations of the judges and the decision of the Court were addressed to the peculiar circumstances of that particular case, and did not lay down any general rule that a committee could in no case covenant on behalf of a lunatic. The Court will, if possible, refuse to adopt any narrow construction of enactments passed for the purpose of facilitating the sale of settled estates.

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LINDLEY L.J. I do not think there is much difficulty in this case apart from *In re Fox*. (1) I was a party to the decision in that case, and, although memory is sometimes treacherous, I cannot believe that we meant to go so far as to say that in no case arising under s. 116 of the Act of 1853 the Court has any jurisdiction to authorize the committee of a lunatic to covenant for the repayment of money. *In re Fox* (1) was a peculiar case. We were asked to sanction a covenant by a committee of the lunatic to pay money for debts not of the lunatic, but of another person, and we doubted whether that could be done, and we would not sanction it. Certainly there are passages in the report which look at first as if Cotton L.J. thought there was no power in the Court to sanction any covenant whatever by a committee on behalf of a lunatic. I doubt whether we intended to go that length; and, if we did, we put an uncommonly narrow construction on s. 116, and one not to be abided by.

At any rate, the present case is a different one, and turns upon a different Act of Parliament; and if we were to construe the Acts now applicable so narrowly as to say there was no jurisdiction on the part of the judge in Lunacy to sanction such a covenant as this, it would in my opinion be a very unfortunate decision. The lunatic has been so found by inquisition, and he is entitled, as tenant for life, to one moiety of an estate. There is an advantageous proposition to sell both moieties of the estate, and the owner of the other moiety agrees; and there is no doubt felt by the judge in Lunacy, or anybody else, that the proposed sale of the whole estate upon the terms which have been previously approved would be extremely beneficial to the lunatic. Now, how is the lunatic to convey the half of the estate in which he is interested as tenant for life? Of course, apart from the Settled Land Act, he could only convey his life interest; but under the Settled Land Act, especially s. 62, the judge in Lunacy has power to authorize the committee of the lunatic to sell the whole estate as if the lunatic were sui juris. If one looks at ss. 3, 4, 20, and 55 of the Settled Land Act of 1882, it will be found that a tenant for life, who is not a lunatic, can certainly enter into an arrangement of this kind; and I do not

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think there is any real difficulty about an ordinary tenant for life selling and expressing himself to convey as beneficial owner. What that means is that if a tenant for life purports to sell under the powers of the Settled Land Act, and is expressed to convey "as beneficial owner," then the covenants referred to in the 7th section of the Conveyancing Act of 1881 will be implied and incorporated. I do not see any difficulty so far. When you come to s. 62 of the Settled Land Act, you find that when the tenant for life, or a person having the powers of a tenant for life under that Act, is a lunatic so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person entrusted with the care of a lunatic, "exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate." What does that mean? It means he may sell the fee simple under the powers conferred by ss. 3 and 4 of the Act, and the sale must be for the best price.

Then when we come to the Lunacy Act, 1890, there is a power in that Act to sell, and s. 124 says: "The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly." That appears to me to authorize the judge in a proper case to sanction an assurance by the committee of the lunatic in the way in which assurances are commonly executed according to the practice of conveyancers in dealing with real property. I do not see how it is possible for the committee to exercise his powers in the most beneficial way unless he enters into some covenants for title as is proposed. These covenants are the common ones and are not onerous. First of all, there will be imported the covenants which by the Conveyancing Act of 1881 are implied when a man conveys, and is expressed to convey, "as beneficial owner." But those covenants are to be followed by a proviso which cuts them down immensely; and the whole effect of the covenants and proviso which we are asked to sanction is to confine the

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covenants to the life estate of the lunatic. If we did not sanction this we should put a fetter on the committee's power which would be most prejudicial to the interests of those whom we are bound to protect. I think, however, the language of the statutes is sufficient for the purpose, and that we ought to approve of this sale.

KAY L.J. Under the Settled Land Act a tenant for life is authorized to sell and convey the fee simple of the land, but he is not authorized to enter into any covenants at all. It was not the purpose of the Act, which had nothing to do with covenants. The Act gave him a statutory power to convey the fee simple, and, of course, primâ facie it applied to a case where the tenant for life was sui juris, and could enter into such covenants as he pleased. But there is nothing in that Act referring to any covenants to be entered into by a tenant for life when he is selling and conveying land. Sect. 62 provides in terms thus: [His Lordship then read that section (1), and continued:—]

As I pointed out, it is no part of the power of a tenant for life under this Act to enter into covenants. Such covenants as he had to enter into were not statutory covenants under the Settled Land Act, and, therefore, this section does not by itself in any way authorize the committee of a lunatic to enter into any covenant. So far it is perfectly clear. But the Conveyancing and Law of Property Act, 1881, does, I confess, give rise to some little difficulty. That Act provides by s. 7, subs. 1 (A), that in a conveyance for valuable consideration other than a mortgage certain covenants are to be implied on the part of a person who conveys, and is expressed to convey, "as beneficial owner"; and these are the usual covenants for title. It is rather difficult to say that a tenant for life under the Settled Land Act conveys the fee simple "as beneficial owner."

(1) "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the power of a tenant for life under this Act."

That he may be expressed to convey as beneficial owner I can understand; but perhaps it is expedient to give to this clause of the Conveyancing Act a wide meaning, for its main object was no doubt to prevent the necessity of setting out all these covenants at length, so that when a person conveys as beneficial owner, and is expressed to convey as beneficial owner, these covenants should be implied. It is a sort of compendious mode of bringing these covenants into a conveyance where they are not set out at length. Moreover, a tenant for life has some beneficial interest because he has a life interest, and, therefore, a conveyance which passes the fee simple includes his life interest. I think it is possible to say, without straining the words, that a tenant for life may convey under the Settled Land Act, 1882, expressing himself to be conveying as beneficial owner for the purpose of introducing these covenants; and, when he does so, the covenants which I have referred to in the Conveyancing Act may be considered as contained in the conveyance.

Then we come to the Lunacy Act, 1890. So far I have found nothing whatever to authorize a committee of a lunatic to enter into covenants for title so as to bind the lunatic. The Conveyancing Act, 1881, does not refer to a committee at all, but to an ordinary person who is sui juris, and is conveying as beneficial owner.

By the Lunacy Act of 1890, s. 120, it is enacted that "the judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things," and the first is—(*a*) sell any property belonging to the lunatic. Then the section comprises sub-ss. (*a*) to (*l*), which state the various things that the judge may authorize and order a committee to do. There is not in any one of those sub-sections any power to authorize the committee to bind the lunatic by any covenant. But in s. 122 we find this: "(1.) The power to authorize leases of a lunatic's property under this Act shall extend to property of which the lunatic is tenant in tail . . . ."; and sub-s. 2 says: "Leases authorized to be granted and accepted by or on behalf of a lunatic under this Act may be for such number of lives or such term of years, at such rents

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and royalties, and subject to such reservations, covenants, and conditions as the judge approves." There you have an express power in the judge to approve of reservations, covenants, and conditions. That provision cannot mean only covenants by the lessee. The words "covenants and conditions" are coupled with the word "reservations," which would be provisionally favourable to the lessor. No doubt the section includes covenants by the lessor—that is to say, the committee on behalf of the lunatic in such a case as this. Therefore, as regards a lease there is an express power for the judge to authorize the committee of the lunatic to enter into covenants. In s. 124 there is no express power of that kind, nor can I find it in any of the other sections referred to. I believe there is no such express power in the Act. But s. 124 enacts as follows: "The committee of the estate, or such person as the judge approves, shall in the name and on behalf of the lunatic execute and do all such assurances and things for giving effect to any order under this Act as the judge directs," and so on. Now, a covenant is not strictly an "assurance." There has been considerable contest as to the meaning of that word in cases arising under the Bills of Sale Acts. An "assurance" is in reality something which operates as a transfer of property; and an assurance can hardly include a covenant. But the section says, "all such assurances and things"; and those two latter words are put in, no doubt, in order to enlarge the power. I should say that, in furtherance of the general intention, this section is wide enough to enable the Court to authorize the committee of a lunatic to execute a conveyance on behalf of a lunatic with all such covenants as are usual in such a conveyance, including the ordinary covenants for title.

But when this case came before me in my private room my attention was called to the case of *In re Fox*. (1) *In re Fox* (1) was not a case under the Lunacy Act, 1890. It was under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), which is worded differently, but very nearly in the same terms. By the Act of 1853, s. 116, it was provided that the Lord Chancellor and other persons intrusted "may order that any estate or

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interest of the lunatic in land or stock"—and so on, may be sold or mortgaged. "And the committee of the estate may and shall, in the name and on behalf of the lunatic, execute, make, and do all such conveyances, deeds, transfers, and things relative to any such sale, mortgage, charge, or other disposition as aforesaid, and for effectuating this present provision, as the Lord Chancellor intrusted as aforesaid shall order." Those words, to my mind, are quite as large as the words in s. 124 of the Lunacy Act of 1890, and, indeed, that section contains certain words which s. 124 does not. Sect. 124 authorizes the committee to execute and do all such assurances and things as the judge directs, and s. 116 of the former Act authorized the committee to execute, make, and do all such conveyances, deeds, transfers, and things. Those words are quite as large, although perhaps not essentially larger than those in the Act of 1890.

Now, in the case of *In re Fox* (1), the lunatic was entitled in fee to one moiety of certain real estate as one of the two co-heiresses of an ancestor who died intestate; and that real estate was liable to pay the debts of the ancestor, his personal estate being insufficient for the purpose. Under these circumstances it was proposed to raise money for the payment of these debts by a mortgage of the property, one moiety of which belonged to the lunatic, and an application was made to the Court in Lunacy to authorize the committee to concur in the mortgage.

The question then arose whether there could be covenants on behalf of the lunatic for the payment of the mortgage money. The mortgage money was not due from the lunatic, but from the ancestor, and the lunatic was only liable to it so far as he obtained assets from that ancestor, and not further. Therefore a personal covenant to pay the money would be a new obligation. But, according to the report, Cotton L.J. said in the course of the argument: "I very much doubt whether the Court can direct a committee to covenant in the name of a lunatic." Those words are large enough to express a doubt whether any covenant whatever could be entered into by a

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committee so as to bind a lunatic, though that may not have been the meaning of the Lord Justice. A little later his Lordship says: "I doubt whether we have jurisdiction to do more than give the mortgagee the rights of a mortgagee against the particular estate." But there can, I think, be no real doubt what the meaning of Cotton L.J. was. He thought that there was no jurisdiction to bind the lunatic's estate by a covenant *of that kind*, though in terms he does not confine his words to that particular covenant. Then, when he comes to give judgment, he says this (1): "It being clearly for the benefit of the lunatic's estate that this 5000*l.* should be raised, we think we can authorize the committee to concur in the name and on behalf of the lunatic in a mortgage of the entirety of a portion of Thomas Fox's estate . . . . provided that the mortgage be so framed that the lunatic's moiety of the property cannot be made liable for any default of the other part owner in payment of her moiety of the principal and interest. We do not, however, see our way to authorizing the committee to enter into any covenant on behalf of the lunatic." The wording of that passage makes it somewhat difficult for the Court to say that any covenant can be entered into on a sale by the committee so as to bind the lunatic. However, Lindley L.J., who was a party to that decision, doubts whether the Court intended to go so far as that, and whether the refusal went further than an exercise of the discretion of the Court as to that particular covenant—namely, a covenant to bind the lunatic to pay money which she was not bound to pay. The difficulty that arises from that case would, therefore, be removed if that is the true construction of it; and I agree that it is beneficial for the sake of lunatics in general to read s. 124 of the Act of 1890 as authorizing the Court in a proper case to allow a committee to bind the lunatic by such covenants as are usual on a sale. I will not go further than that. Of course, the ordinary covenants for title are usual on a sale; and, therefore, I think in this case we may say that, the difficulty arising from the decision in *In re Fox* (2) being removed, the Court has jurisdiction to approve of this sale.

(1) 33 Ch. D. 39. (2) 33 Ch. D. 37.

A. L. SMITH L.J. The question in this case is whether or not a committee of a tenant for life who has been found a lunatic by inquisition has not only the power of selling the lunatic's estate, but has also the power of entering into the covenants which are necessary for that purpose. There can be no doubt—in fact, it is not disputed—that the covenants in question are covenants necessary for the carrying out of the sale, if it is to be effected; and the sale has been found beneficial for the lunatic's estate. The question is whether there is the power. That drives one to the statute to see whether this power is given to a committee under these circumstances or not. [His Lordship then read s. 62 of the Settled Land Act of 1882, and continued:—]

That is clear. Then comes the question, What powers has a tenant for life who is not a lunatic so found by inquisition as regards selling the estate? That drives one back to s. 3, which enacts that a tenant for life may sell the settled land. Sect. 4 again says: "Every sale shall be made at the best price that can reasonably be obtained." Then s. 55, sub-s. 2, enacts that where a power of sale is exercised by a tenant for life he may "execute, make, and do all deeds, instruments, and things necessary or proper in that behalf." It does seem to me that the conjoint operation of those sections would give a tenant for life power not only to sell, but also to enter into covenants necessary for the purpose of effecting that sale.

The question does not, however, rest there, because the Lunacy Act of 1890 also applies to a case like this. By s. 120, "The judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things"; and the first is, sell any property belonging to the lunatic. Reading that in conjunction with the Settled Land Act, s. 62, there is power to sell the property of a lunatic when he is tenant for life. Then what happens after that? The committee of the estate, in the name and on behalf of the lunatic, may execute and do all assurances and things for giving effect to an order under this Act that the judge directs. If we were to put the limited construction on this Act which has been suggested, we should be bringing these two Acts of Parliament

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as regards lunatics so found by inquisition to a deadlock; because in numberless cases the committee could not effect a sale beneficial to the lunatic's estate without entering into proper covenants with the purchaser, who would not buy unless those covenants were entered into. Taking not what I call a broad view, but a correct view, of these sections together, I think there is power given to a committee to enter into proper covenants when he sells the estate of a lunatic tenant for life.

Then we were referred to *In re Fox*. (1) I have nothing to say about that case beyond what has been said already. I do not read it as a decision that in no case can an order be made for a committee of a lunatic to enter into any covenants at all. The real decision was that on the facts which were there present the Court did not see its way to authorize what was applied for. I think, therefore, we should confirm the agreement in the present case.

Their Lordships ordered that the costs of the application should be costs in the lunacy.

Solicitors: *Blunt & Co.*

W. W. K.

C. A. 1896 — NORTH J. *Jan.* 30. — C. A. *Feb.* 26.

In re SANDERS' SETTLEMENT.

[1893 S. 0128.]

Solicitor—Costs—Taxation—Scale Fee—"Conveyance of Property"—Grant of New Easement—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order under Act, r.* 2; *Sched. I., Part I.*

A grant of a new easement is not a "conveyance of property" within the meaning of Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, and consequently the scale fee prescribed by Part I. of that schedule does not govern the remuneration of a solicitor in relation to such a transaction.

Sched. I., Part I., applies to cases in which an existing property or right is transferred, not to cases in which a new right or easement is created for the first time.

Decisions of Kay J. in *In re Stewart* (41 Ch. D. 494) and of Chitty J. in *In re Earnshaw-Wall* ([1894] 3 Ch. 156) approved.

SUMMONS by the London County Council to review a taxation of the costs of the petitioner of and incident to a petition

(1) 33 Ch. D. 37.

for the reinvestment of part of a fund in court, which represented the purchase-money of land taken by the Metropolitan Board of Works (the predecessors of the London County Council) under their statutory powers.

The land taken by the Metropolitan Board formed part of a freehold estate situate at Denmark Hill, Surrey, which was subject to the trusts of a settlement dated June 4, 1866, and made upon the marriage of Arthur Sanders with Isabella Synge.

Under this settlement, by reason of the death of Arthur Sanders on April 15, 1886, Robert Arthur Sanders, his eldest son, who attained twenty-one on June 20, 1888, became entitled to the settled estate in fee, subject to certain terms to secure the payment of a rent-charge to his mother, and portions for the younger children of the marriage.

The purchase-money of the land taken by the board was paid into court in March, 1888.

The settled estate was being developed for building purposes, and it was proposed to construct a new road forty feet wide upon it. It was considered desirable that this road should be connected with a road, called Fawnbrake Avenue, which had recently been constructed on an adjoining settled estate belonging to persons named Gubbins. Fawnbrake Avenue had been dedicated to the public. Between one end of it and the Sanders' estate there was a strip of land five feet wide, which formed part of the Gubbins' estate, and in order to connect the intended new road on the Sanders' estate with Fawnbrake Avenue, it was necessary to extend that avenue across the strip of land. Accordingly, on July 21, 1893, an agreement was entered into between the owners of the Gubbins' estate and R. A. Sanders, whereby it was agreed (1.) that R. A. Sanders should, within two years from the date of the agreement, make and complete the proposed new road on the Sanders' estate, and should, as soon as might be after the completion thereof, dedicate the same to the use of the public; (2.) that R. A. Sanders should pay 516*l.* to the owners of the Gubbins' estate immediately after the approval by the London County Council of the proposed new road on the Sanders' estate, and the approval by the Lambeth Vestry

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of the plan of the sewer proposed to be made under that proposed new road in connection with the sewer under Fawnbrake Avenue, should have been obtained; (3.) that for the considerations before mentioned, and upon payment of the 516*l.*, the owners of the Gubbins' estate should permit R. A. Sanders, within the said period of two years, to extend and complete Fawnbrake Avenue upon and over the strip of land, so as to connect Fawnbrake Avenue and the sewer thereunder with the proposed road on the Sanders' estate and the proposed sewer thereunder, and should, as soon as might be after the completion thereof, dedicate the said extension to the use of the public, and that R. A. Sanders should, within the said two years at his own expense, make and complete the said extension accordingly; (4.) that, upon the approval of the plans and the payment of the 516*l.*, and of certain costs, R. A. Sanders, his heirs and assigns, should have a right of way over the strip of land, for the purpose of making and completing the proposed new road on the Sanders' estate and the sewer thereunder; (5.) that, after the completion of the proposed road on the Sanders' estate and the extension of Fawnbrake Avenue, and until the dedication thereof respectively to the use of the public, R. A. Sanders should keep the proposed new road and the extension of Fawnbrake Avenue in good repair, and should have a right of way for all purposes over the extension of Fawnbrake Avenue, and the owners of the Gubbins' estate should have a right of way for all purposes over the proposed new road on the Sanders' estate; (8.) that the agreement was subject to the approval of the plan of the proposed road by the London County Council, and the approval of the plan of the proposed sewer under that road by the Lambeth Vestry, and R. A. Sanders should do his best to obtain those approvals.

On August 5, 1893, upon a petition by R. A. Sanders, to which the London County Council and the trustees of the Sanders' settlement were respondents, an order was made by North J. that the proposed purchase of the right of way over the extension of Fawnbrake Avenue, and the construction of the proposed new road, and the construction of the sewers under the same, and the brick sewer in extension thereof be approved as a proper

investment of a competent part of the funds in Court. An inquiry was directed whether a good title could be shewn to the strip of land on which the extension of Fawnbrake Avenue was to be made, and, if a good title could be shewn, it was ordered that a proper conveyance or grant be settled by the judge. And it was ordered that, upon due execution of the conveyance or grant being certified, a sum not exceeding 5000*l.* should be paid out of Court to the parties to whom it should be certified to be payable.

The order further directed that, pursuant to s. 80 of the Lands Clauses Consolidation Act, 1845, the London County Council should pay to the petitioner his taxed costs of the investment of the 516*l.* in the purchase of the right of way, of obtaining the order, and of all proceedings relating thereto.

A good title to the strip of land was shewn, and on September 4, 1894, a deed was executed by the owners of the Gubbins' estate, by R. A. Sanders, and by the trustees of the Sanders' settlement. This deed contained a recital of the agreement of July 21, 1893, and of the approval of the plans as thereby provided. And it was witnessed that in consideration of the sum of 516*l.* to be paid pursuant to the order of August 5, 1893, the owners of the Gubbins' estate did thereby grant unto the trustees of the Sanders' settlement and R. A. Sanders, their heirs and assigns (1.) full right and liberty for the Sanders' trustees and R. A. Sanders, their heirs and assigns, and others the owners or owner for the time being of the estate at Denmark Hill, at all times for the space of two years from July 21, 1893, with surveyors, workmen, carts, wagons, &c., to enter upon the strip of land forty feet in length and five feet in breadth, lying between the then present end of Fawnbrake Avenue and the intended commencement of the proposed new road on the Sanders' estate, for the purpose of making and completing the said proposed road and the sewer thereunder, and extending and completing Fawnbrake Avenue upon and over the said strip of land, so as to connect Fawnbrake Avenue and the sewer thereunder with the said proposed road and the proposed sewer thereunder; (2) full right and liberty for the Sanders' trustees and R. A. Sanders, their heirs and assigns,

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and other the owners or owner for the time being of the estate at Denmark Hill, and their respective agents and servants, &c., after the completion of the proposed road and the extension of Fawnbrake Avenue over the strip of land, and until the dedication of the same respectively to the use of the public, to pass and repass at all times and for all purposes, &c., over the strip of land. And it was also witnessed that, in further pursuance of the agreement, and in consideration of the premises, the trustees of the Sanders' estate and R. A. Sanders, as beneficial owner, did thereby grant to the owners of the Gubbins' estate, &c., full right and liberty after the completion of the proposed new road on the Sanders' estate, and of the extension of Fawnbrake Avenue over the strip of land, and until the dedication thereof respectively to the use of the public, to pass and repass at all times and for all purposes, &c., over and along the proposed new road on the Sanders' estate. And it was thereby agreed and declared between and by such of the parties to the deed as were parties to the agreement of July 21, 1893, that that agreement, so far as it had not already been or was not by the deed carried into effect, should continue in full force and be duly performed and observed by the said parties thereto respectively, save and except as regarded the payment of the 516*l.* by the said R. A. Sanders, which sum was intended to be paid pursuant to the order of August 5, 1893.

After the execution of this deed the 516*l.* was paid in pursuance of the order to the owners of the Gubbins' estate.

On the taxation of the costs under the order of August 5, 1893, the county council insisted that the petitioner's solicitors could only claim to be remunerated by the scale fee under Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881. The solicitors claimed to be paid their costs according to the old system as altered by Sched. II., and the taxing master taxed the costs in that way.

The county council carried in objections to the taxation, to the effect that *In re Merchant Taylors' Co.* (1) applied, and that the purchase of the right of way was, as against the council, an investment in land; that the definition of "land" in the Settled

(1) 29 Ch. D. 209; 30 Ch. D. 28.

Land Act, 1882, s. 2, sub-s. 10, included incorporeal hereditaments; and that the purchase of a right to make a road, a right of way over the road when made, and the right to lay a sewer thereunder, was a substantial purchase of land so as to bring the purchase within the scale in Sched. I., Part I., of the General Order. (1)

(1) By the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 2, the Lord Chancellor and other persons therein mentioned "may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the chambers of any judge or master, and not being otherwise contentious business, and may revoke or alter any such order."

The General Order made in pursuance of this Act provides by rule 1 that Sched. I. to the order "shall not apply to transactions respecting real property, the title to which has been registered under" the Acts therein mentioned.

Rule 2: "Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the chambers of any judge or master, is to be regulated as follows, namely:—

"(*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Sched. I. to this order, and to be subject to the regulations therein contained."

(*b*) Relates to leases, and agreements for leases, other than mining and building leases, or conveyances reserving rent, or agreements for the same.

"(*c*) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore, or in Sched. I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Sched. I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Sched. I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto."

Schedule I., Part I. contains a "scale of charges on sales, purchases, and mortgages, and rules applicable thereto."

In this part of Sched. I. there is provided (inter alia) a fee in proportion to the amount of the purchase money for "purchaser's solicitor for

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The taxing master answered the objections thus: "I consider that this purchase comes under the decision of Kay J. in *In re Stewart* (1), as approved by Chitty J. in *In re Earnshaw-Wall* (2), and that I am bound by those cases, and in accordance therewith I have allowed detailed charges."

The county council took out a summons to review the taxation. The summons was heard before North J. on January 30, 1896.

W. Baker, for the London County Council.

Gent, for R. A. Sanders, was not called upon.

[It is considered unnecessary to report the arguments, inasmuch as they are fully reported upon the subsequent hearing in the Court of Appeal.]

NORTH J. The taxing master had no choice but to follow the decision of Kay J. in *In re Stewart* (1), that a new grant of an easement is not a "conveyance of property" within the meaning of Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act. I feel myself equally bound by that decision, and I shall simply follow it and dismiss this summons with costs.

C. A.

From this decision the London County Council appealed. The appeal was heard on February 26, 1896.

W. Baker, for the appellants. Formerly a purchase of an incorporeal hereditament was not a "reinvestment in land" within the meaning of s. 69 of the Lands Clauses Consolidation Act, 1845, but, now, by virtue of the Settled Land Act, 1882, ss. 2 (sub-s. 10), 21 (vii., viii.), 32, the purchase-money of land taken by a company or a public body under statutory powers can be invested in the purchase of an incorporeal hereditament. It is submitted that the deed of grant of September 4, 1894,

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negotiating a purchase of property by private contract," and another similar fee for "purchaser's solicitor for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)."

(1) 41 Ch. D. 494.

(2) [1894] 3 Ch. 156.

was a "conveyance of property" within the meaning of Part I. of Sched. I., and that the scale of fees applies. If the solicitor is remunerated under the scale he will receive 12*l.* 10*s.*; if he is remunerated under Sched. II. his charges will amount to about 95*l.* *In re Stewart* (1) is distinguishable from the present case, and it was distinguished by Chitty J. in *In re Earnshaw-Wall.* (2) In *In re Stewart* (1) the grantor of the estate could continue to use the surface of his land just as before the grant, provided that he did not interfere with the grantee's water-pipes. In the present case, the new road being a "street," the grantors will practically part with all their interest in the surface of the land over which the right of way is granted when the dedication to the public is made: *Coverdale* v. *Charlton.* (3) In *In re Stewart* (1) the money paid for the easement was small; here it is very large. If the 516*l.* were paid for the purchase in fee of the strip of land over which the right of way is granted, the purchase-money per acre would amount to more than 100,000*l.* *In re Earnshaw-Wall* (2) applies, and it is not desirable to draw subtle distinctions: *In re Merchant Taylors' Co.* (4)

Channell, Q.C., and *Gent*, for R. A. Sanders. *In re Stewart* (1) was rightly decided, and at any rate the present is an a fortiori case. When an incorporeal hereditament, such as an advowson, is sold, an already existing property is conveyed by the grantor to the grantee. In such a case as the present an easement which had no previous existence is newly created by the deed of grant, and the title which has to be investigated is the title, not to the easement, but to a property out of which or over which the easement is granted. The case would be entirely different if a previously existing easement were conveyed. In the present case the property of one landowner is improved at the cost of another landowner. The deed is not a "conveyance of property"; it creates for the first time that which may become property. A deed of exchange would involve the conveyance of some property, and yet the scale would not apply to such a case. A small sum of money

(1) 41 Ch. D. 494.
(2) [1894] 3 Ch. 156.
(3) 4 Q. B. D. 104.
(4) 29 Ch. D. 209; 30 Ch. D. 28.

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might be paid for owelty of exchange, but the scale fee measured by that sum would give wholly inadequate remuneration to the solicitor. In the present case the transaction was more like an exchange than a purchase, and the payment for the right of way over the strip resembled a sum paid for owelty of exchange. The construction of the new road was an advantage to both the landowners. The owners of the Sanders' estate incurred other obligations besides the payment of the 516*l.*; they had to construct the new road at their own expense. The landowners respectively agree to dedicate to the public the road over their respective lands. The purchase is not made merely for a money consideration. The scale applies to some only of the matters to which by virtue of s. 2 of the Act it might have applied, and this transaction is included in "other business," which is dealt with by clause 2 (*c*) of the General Order and by Sched. II.

W. Baker, in reply. The word "conveyance" is applicable to a grant of a new right of way just as much as to a transfer of a right of way already existing. The definition of "conveyance" in s. 2 (v.) of the Conveyancing Act, 1881, will include a grant of a new right of way, and the framers of the General Order under the Solicitors' Remuneration Act must be taken to have had that definition in their minds.

Lindley L.J. (after stating the facts). If we look at the agreement of July 21, 1893, it is obvious that it is not merely an agreement for the purchase of a right of way across the strip of land. It includes that, and no doubt the 516*l.* is the only money consideration expressed in the agreement, and it is expressed to be the consideration for the grant of the right of way. But the two sets of trustees are accommodating each other, and the Gubbins' trustees stipulate, not only for the payment of 516*l.*, but also for the construction of the new road across the Gubbins' property, and for the right to use it before it becomes a highway, and it is agreed that when the whole thing is done the new road shall be a public road. It is not, therefore, a mere agreement for purchase and sale. Then the agreement was carried out by the deed of September 4, 1894, which, again, is not a mere conveyance of the right of way in

consideration of 516*l*. It is that and something more, and, in approaching the point which we have to decide, it is important to observe that the question whether the solicitor is to be remunerated by the scale fee prescribed under the Solicitors' Remuneration Act, or in another way, does not depend upon the abstract question of law whether an easement is "property" (in one sense an easement is obviously property), nor does it depend upon whether the grant of a new easement—the creation of an easement—can be properly called a "conveyance." What we have to consider is the meaning of the scale for the payment of solicitors prescribed by the General Order. The solicitor who prepared the agreement of July, 1893, and the deed of September, 1894, no doubt considered that he might charge for his work according to the ordinary course before the scale of fees was invented. Relying no doubt upon the decision in *In re Stewart* (1), he took it for granted that the scale would not apply. [His Lordship referred to the order of August 5, 1893, and continued:—]

The solicitor's bill of costs has been carried in for taxation, and the taxing master has held that the scale, so far as regards what I may call shortly the purchase of the easement—the right of way—does not apply. North J. has taken the same view, and the London County Council have appealed to us. They have to satisfy us, if they can, that the costs ought to be taxed according to the scale, in which case, it is said, the costs will amount to 12*l*. 10*s*., whereas, if the scale does not apply, the costs will be about 95*l*. The question is of some little importance in this particular case; but it is, perhaps, of more importance from a general point of view.

Now, let us look at the Act and the General Order which relate to this mode of payment. The language of s. 2 of the Act is, no doubt, large enough to cover the rules which have been made, and any other rules which may be made relating to the remuneration of solicitors for the work therein referred to, which may be called "conveyancing work" and "non-contentious work." The rules which have been made by the General Order under the Act are so worded that it is necessary to see

(1) 41 Ch. D. 494.

C. A. 1896 — *In re* SANDERS' SETTLEMENT. — Lindley L.J.

under which clause any particular work comes. Rule 2 contains three clauses, (*a*), (*b*), and (*c*), and we must not read one of them alone—we must read them all three. Clause (*a*) deals with "sales, purchases, and mortgages completed," and, looking at that clause alone, I am not prepared to say that such an agreement as that of July, 1893, or such a conveyance as that of September, 1894, would not fall within it. The transaction may in some sense be considered as a "sale and purchase" of this right of way; but, at the same time, it is obvious, when you look at the deed, that that is not a full description of it. If you regard it as a sale of a right of way you must add that it is a good deal more than that. That is important when we look at the other clauses of the rule. I do not think clause (*b*), which deals with leases, is material. But clause (*c*) is important. It says that, in respect of certain specified business, "and of all other business the remuneration for which is not hereinbefore, or in Sched. I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Sched. II. hereto."

That takes us to the schedule, and when you come to Sched. I., Part I., you find this: "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto." Then, looking down the scale, you find, "Vendor's solicitor for negotiating a sale of property by private contract," so much; "for conducting a sale of property by public auction," so much when the property is sold, and so much when it is not sold. Then, "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance," so much. Then we come to "purchaser's solicitor for negotiating a purchase of property by private contract," so much; "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)," so much. The scale fee prescribed is a percentage on the amount of the money consideration. Part II. of Sched. I. applies to leases and conveyances at a rent, other than mining leases. Then we come to Sched. II., which deals with other business the remuneration for which is not thereinbefore prescribed, and for that the solicitor is to be

remunerated "according to the present system as altered by Sched. II."

The language used is, I think, somewhat obscure; it is not very clear whether this business comes within Sched. I. or within Sched. II. But, when you speak of a "conveyance of property," and a "sale of property," primâ facie that language is adapted to an existing property and to the transfer of it. I do not say that it could not possibly be extended so as to include that which is popularly called a "conveyance," although the so-called conveyance creates the thing which is said to be conveyed. But, looking at the substance of the matter, and bearing in mind that, as a rule the consideration for the grant of an easement is but small, whereas the trouble of investigating the title of the grantor, &c., may be very great, it seems to me that such a "conveyance" would more naturally fall under the head of "Business not otherwise provided for." That, I think, would be the business view. And that is the view which was adopted by my brother Kay in *In re Stewart*. (1) I do not understand his decision to be based upon the theory that an easement is not property; it is based upon the theory that a deed which creates an easement for the first time is not a sale or conveyance of property within clause (*a*) of rule 2, but is "other business" included in clause (*c*). In my opinion that decision was right, and it is quite consistent with it to say that the sale of an advowson is within the scale. But, anyhow, in my opinion, the transaction with which we are now dealing does not come within clause (*a*) of rule 2, or within the scale. In this particular case I have no doubt whatever about it. I cannot conceive that a deed such as that with which we have to deal is a mere sale, or that the solicitor should be remunerated for the business connected with it upon the basis of its being a mere sale. By it arrangements are made between two adjoining owners, and the mere fact that one of them gives 516*l.* for the right to cross a piece of land belonging to the other, plus what that other obtains by the arrangement in other ways, does not make the transaction a conveyance and sale in the ordinary view of business men. Under the circumstances

(1) 41 Ch. D. 494.

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of this particular case I have no doubt that North J. was right. But I do not wish to throw any doubt upon the rule, which had better be settled once for all, that a deed creating an easement for the first time does not come within clause (*a*) of rule 2, but comes within clause (*c*).

KAY L.J. By the Solicitors' Remuneration Act, 1881, s. 2, an authority is constituted which has power to make an order for prescribing and regulating the remuneration of solicitors in respect of conveyancing and other business, not being contentious business. I think the words of this section include the creation of an easement; they are as large as well may be. Therefore, undoubtedly this authority had power to make orders fixing a scale fee for (inter alia) the creation of an easement. That an easement is "property" no one would think of denying, and to my mind it is plainly within the words of s. 2 of the Act.

The next thing to be observed is this, the General Order which has been made shews on its face that the framers did not intend to include in the scale every case, because by clause (*c*) of rule 2, it is expressly provided that in respect of business not covered by the previous clauses (*a*) and (*b*) of rule 2, the solicitor shall be remunerated according to the then present system as altered by Sched. II. They did not intend to make the scale apply to all business which was not contentious business. The framers of the order were perfectly well aware that the order which they were making was not so extensive as that.

Then we must look at Sched. I., and see how the scale can be applied to such a case as the present. This is not a transfer of property in the ordinary sense of that word. No existing subject of property was conveyed from the owner to another person; there was a grant out of the owner's property of a new easement upon or over his property. Take other instances which were put during the argument. Suppose the grant had been of a right to the passage of light over the land of A. to a window of B., that would have been a grant of a new easement, or suppose the grant had been of the right for the smoke from B.'s chimney or from B.'s brick kiln to pass

over the land of A., and a consideration had been paid for that right, that also would have been a grant for the first time of an easement, and not a transfer, in the ordinary sense of that word, of any existing property. The easement would never have existed as an easement until it was created by the grant. Now does Sched. I., Part I., apply to a case of that kind? I confess that it does not seem to me to come within the primâ facie meaning of the words. I will take the case of the purchaser's solicitor. "Purchaser's solicitor for negotiating the purchase of property." No doubt this is a "purchase of property" in one sense of the words. Again, "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)." No doubt, that must mean a conveyance of that property the title to which is investigated. Primâ facie "conveyance" is not an apt word to describe a deed by which an easement over the property of some one is created for the first time. If an existing easement belonging to A. B. was by him being transferred to another person, the deed would come within these words plainly enough; it would be a transfer of property. And it seems to me that primâ facie what Part I. of Sched. I. contemplates is a transfer of some existing property, and not a creation of a mere right—an easement or any other mere right—which is for the first time created by the deed in question. Such a deed may in one sense be called a "conveyance," but it is not a "conveyance" in the sense of being a transfer of some already existing thing. I say this because there seems to have been some question about the words which I used in deciding *In re Stewart*. (1) I am reported to have said (2): "Obviously the schedule contemplates primâ facie conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase-money which is paid when such property changes hands. When a mere easement is granted there is no change of property in that sense, and the purchase-money is comparatively trifling in amount; but it might well be that a difficult and expensive investigation of the grantor's title might in many cases be

(1) 41 Ch. D. 494. (2) 41 Ch. D. 506.

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necessary, for which a scale charge, calculated on the purchase-money of the easement, would be a very inadequate compensation." Now in *In re Earnshaw-Wall* (1) Chitty J. referred to my decision and quoted the words which I have just read, and he added (2): "His words had reference to the particular circumstances of the case before him; he was not dealing with the general question, nor with the question of property passing by conveyance; he did not express any decided opinion on the point before me. I should feel bound to follow him if I thought he intended to lay down the proposition that the term 'property' did not include incorporeal hereditaments; but, as I consider he did not so intend, I am free to decide as I do." How it could be imagined for a moment that I meant to say that "property" did not include incorporeal hereditaments, I cannot conceive. In the case in which my language was used, the particular easement—a license to lay down pipes on the land of another—was created by a deed, and I used the word "grant" to express unmistakably, as I thought, the difference between the transfer of a thing which already existed and the creation of a thing for the first time by a grant. I never suggested that a transfer of an existing easement, or of an existing incorporeal hereditament of any kind, from a vendor to a purchaser would not come within Sched. I., Part I. I certainly think it would. But I still remain of opinion that, if the deed in question merely creates for the first time an easement over land, the words of Sched. I., Part. I. are not very apt to meet the case, and I do not think they were intended to meet it. I have already pointed out that it appears distinctly upon the face of the General Order that Sched. I. was not intended to include every kind of business, and that in fact a great many cases are left to be dealt with under Sched II. by which the ordinary rules as to costs are somewhat modified, and I cannot help thinking that, if it had been present to the minds of the framers of the order, they would not have included in Sched I. the creation of a mere easement by deed, but would have left it to be dealt with by Sched. II. In my opinion this is the right construction of these rules. Therefore, even if the 516*l.* were

(1) [1894] 3 Ch. 156. (2) [1894] 3 Ch. 159.

strictly the purchase-money for the grant of an easement then created for the first time, I should think that the case would not come within Sched. I. But, as has been already pointed out, there is more than that here, because the deed by which this right or easement was created contains a sort of give and take arrangement. Benefits besides the purchase-money were given to the vendors by the purchasers, and therefore that the scale fee on the purchase-money should be the only fee which could be charged by the purchasers' solicitor seems to me not consistent with the General Order. For these reasons I think that the decision of North J. was quite right. If the authorities who have power to make orders under the Act think it right to make a new rule including such a case as the present under Sched. I., they can do so, but the rule would have to be much more explicitly worded than is Sched. I. to the General Order as it stands at present.

A. L. Smith L.J. I am of the same opinion. I think that the judgment of Chitty J. in *In re Earnshaw-Wall* (1) was right, and that the judgment of Kay J. in *In re Stewart* (2) was also right. The main distinction between the two cases is this, that in the first a transfer of existing property was effected by the conveyance, and in the second as (in the present case) there was no transfer of already existing property, but the conveyance itself created a right which had no existence before. It seems to me therefore that the present case does not come within the words of Sched. I. Part I., and I think it is governed by *In re Stewart.* (2) In my opinion that case was rightly decided, and North J. was quite right in following it.

Appeal dismissed with costs.

Solicitors: *W. A. Blaxland; Withall, Trotter & Patteson.*

(1) [1894] 3 Ch. 156. (2) 41 Ch. D. 494.

W. L. C.

CHITTY J.
1896
Feb. 14, 15.

THWAITES *v.* COULTHWAITE.

[1894 T. 2376.]

Partnership—Action for Account—Illegal Business—Bookmaking and Betting—Intention of Partners—User of "place" for Purposes of Betting—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

The fact that one partner has been guilty of illegal acts in the conduct of the partnership business is no defence to an action for account by the other partner, where the objects of the partnership were not illegal, and the innocent partner at the time of entering into the partnership intended that it should be carried on lawfully.

The plaintiff and defendant were partners in a bookmaker's and betting business, which was carried on by the defendant; the plaintiff claimed an account of the profits of the partnership, and the defendant contended that, having regard to the nature of the business, no such relief could be obtained:—

Held, that as a bookmaking and betting business could be carried on without contravening the Betting Act, 1853, and that as the plaintiff when he entered into this partnership contemplated that the business would be so carried on in the usual way, the fact that the defendant had acted illegally was immaterial, and the plaintiff was entitled to the account claimed.

TRIAL OF ACTION.

The object of this action was to obtain the usual partnership account of profits of a bookmaker's business; the principal defence, which raised the only question calling for any notice in this report, was that, having regard to the nature of the business in which the alleged profits were earned, no such relief could be given. The facts, so far as material, were as follows:—

The plaintiff was a turf commission agent; the defendant was a bookmaker. In August, 1894, the plaintiff and defendant entered into partnership as commission agents and bookmakers, on the terms that the plaintiff should contribute one-fourth part of the capital, 1000*l.*, and be entitled to one-fourth of the net profits, and that the business should be under the control of, and be managed by, the defendant. The partnership was an oral one. On September 12, 1894, the plaintiff determined the partnership, and shortly afterwards received back from the

defendant all the capital he had contributed; the plaintiff, however, alleged that large profits had been made, and brought the present action claiming an account. By his statement of defence the defendant pleaded that the plaintiff's claim to an account of profits was "one which, having regard to the nature of the business in which such alleged profits were earned, the Court cannot enforce."

The plaintiff, and the defendant and his clerk, were examined and cross-examined in Court, the evidence of the plaintiff being that when he entered into the partnership he contemplated that the business would be carried on in the ordinary way in which such a business is usually carried on by a bookmaker who makes his bets in Tattersall's inclosure at race-meetings; the evidence of the defendant was that most cash bookmakers, such as he was, systematically evaded the rules of the inclosure by bringing in with them a stool or collapsible box, on which they stood to make themselves conspicuous while they shouted the odds on each race. The result of the evidence is more fully referred to in the judgment.

Levett, Q.C., and *J. W. Moyses*, for the plaintiff.

R. Younger, for the defendant. This was an illegal business. There is no legal method of carrying on a cash bookmaker's business: as carried on by the defendant it was illegal. Tattersall's inclosure would be a "place" within the meaning of the Betting Act (16 & 17 Vict. c. 119): *Eastwood* v. *Miller*. (1)

[CHITTY J. That was keeping a "place"; the appellant there was owner or occupier of the field: that is not your case.]

I rely on s. 3; the defendant was using the inclosure as a "place" for betting: *Shaw* v. *Morley* (2); at any rate, the collapsible box or stool which the defendant used was a "place" within the meaning of the Act: *Gallaway* v. *Maries* (3), just as much as the umbrella was in *Bows* v. *Fenwick*. (4)

[CHITTY J. *Doggett* v. *Catterns* (5) seems to shew that a

(1) L. R. 9 Q. B. 440.
(2) L. R. 3 Ex. 137.
(3) 8 Q. B. D. 275.
(4) L. R. 9 C. P. 339.
(5) 19 C. B. (N.S.) 765.

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bookmaker's business may be carried on without contravening the statute.]

"Place" does not necessarily mean one particular spot: *Reg.* v. *Preedy*. (1) Possibly some of the larger bookmakers, who bet on commission, act legally; but my point is that the ordinary method of carrying on a cash bookmaker's business must be illegal, and therefore the Court can grant this defendant no relief.

[CHITTY J. referred to the case of a suit by one highwayman against another for a partnership account of his share of the plunder. (2)]

[*Liddell* v. *Lofthouse* (3) was also cited from the *Times* of February 14, 1896.]

Further, I say that even if an account were directed, the profits having been made illegally, the chief clerk would not allow them.

Levett, Q.C., in reply. Betting per se is not illegal: a bookmaker's business can be carried on lawfully; and the plaintiff, when he entered into this partnership, contemplated that the business would be carried on in the ordinary way and in a lawful manner; the fact that the defendant may have acted illegally is therefore immaterial.

CHITTY J., after stating the facts, and deciding that another defence raised by the defendant failed, continued:—The second defence, and by far the more important one, is that this partnership is an illegal one, being formed for a purpose forbidden by statute, although independently of the statute there would be no illegality. The statute relied on is the Betting Act, 1853. The first question that arises is this: Is the business of bookmaking necessarily illegal? That is to say, must it necessarily be carried on in such a manner as to fall within the provisions of this statute? The answer to this question appears to me to be in the negative. The Gaming Act, 1845 (8 & 9 Vict. c. 109), did not make betting illegal; this statute, as is well

(1) 17 Cox, C. C. 433.
(2) *Everet* v. *Williams*, Law Quart. Rev. ix. 197, Lindley on Partnership, 6th ed. p. 101, n., and *Add.*
(3) [1896] 1 Q. B. 295.

known, merely avoided the wagering contract. A man may make a single bet or many bets; he may habitually bet; he may carry on a betting or bookmaker's business within this statute, provided the business as carried on by him does not fall within the prohibition of the Betting Act, 1853. That a betting business may be carried on without contravening the Betting Act, 1853, is, I think, shewn from *Doggett* v. *Catterns* (1), where the habitual use of a spot in Hyde Park for the purpose of receiving deposits, to return a larger sum on the contingency of a particular horse winning a race, was held not to be the using of a "place" for such purpose within the prohibition of the Betting Act, 1853.

The next question is whether the parties intended or contemplated that this partnership business should be carried on in a manner prohibited by the statute. If they did, the partnership was illegal, even though nothing definite might have been said at the time the partnership contract was entered into as to the mode of carrying on the business. As the partners were not the "owners occupiers or keepers" of any "house office room or other place," it is plain that the case is not within s. 1 of the Betting Act, 1853; the case made by the defendant turns on the 3rd section, which prohibits the use of "any house office room or other place" for any of the purposes there mentioned. The plaintiff's evidence came to this: he said that when he entered into this partnership he contemplated that the business would be carried on in the ordinary way in which bookmakers usually carry on their business in Tattersall's inclosure at race-meetings; he has been cross-examined for the purpose of shewing that he had seen bookmakers in the inclosure, standing on boxes, which seem to be ingeniously contrived so as to collapse when the keen eye of authority happens to fall on the bookmaker, and he says he has not. The object of the box appears to be to elevate the bookmaker above the heads of ordinary persons, thus making him conspicuous, and also enabling him to be heard in what the defendant and his clerk described as the "swells inclosure." On the plaintiff's evidence it also appears that, by the rules of Tattersall's inclosure, boxes or stools are

(1) 19 C. B. (N.S.) 765.

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not permitted to be brought in; and on this point there was no substantial controversy between the plaintiff and defendant. It is practically admitted that at English race-meetings the rules are against the bringing into the inclosure of these contrivances; but the defendant says that there are many bookmakers who, by "squaring"—a euphemistic term for bribing—the gate-keeper, do manage to bring these contrivances into the inclosure; or, if this method fails, then they are smuggled in under a mackintosh or some other article of clothing. The plaintiff's evidence was—and I see no reason to disbelieve him—that, as he was previously acquainted with the defendant when he was a clerk to a bookmaker he mentioned, a box was not used; and he said that subsequently, at any rate at Liverpool, where he seems to have attended several meetings, the bookmakers do not stand on these boxes in the inclosure. The result of this evidence is, that though the defendant himself might in some instances have smuggled in this box into the inclosure and used it for the purposes of betting, yet the plaintiff himself did not anticipate that this would be the mode of carrying on the partnership business. The gist of the point made by the defendant's counsel as to the use of this box is that it brings up the question, so often mooted, as to what is a "place" within the meaning of the Betting Act, 1853. A man, whether betting or not betting, must be in some place; and it is obvious in the Act that the word "place" is not used in its most general sense. The Courts have been frequently called on to decide what is a "place" within the meaning of this Act, which is so well known that I refrain from reading the preamble here; the question turns on s. 3: a "place" to fall within the Act must be in some sense fixed and ascertained. The Courts have wisely declined to define a "place" in general terms, inasmuch as the Legislature has not done so beyond what may be gathered from the context, but have contented themselves with applying the Act to the circumstances of each particular case. A "place" may, unquestionably, be an uncovered place, as was decided in *Eastwood* v. *Miller* (1); it may be a little bay at the back of a hoarding on a quay, bounded by the stays supporting the hoard-

(1) L. R. 9 Q. B. 440.

ing, as was recently decided by Lindley and Kay L.JJ., sitting as a Divisional Court, in *Liddell* v. *Lofthouse* (1); it may be a temporary wooden structure erected on a strip of ground bounded by an iron railing which surrounded the inclosure, with a line of desks fronting both ways, as in *Shaw* v. *Morley* (2), where the Court held that the structure, though open to the air, was an "office" and a "place" within the meaning of the statute. Then, again, in the well-known umbrella case, *Bows* v. *Fenwick* (3), where the bookmaker stood on a stool under a large umbrella, the umbrella being fixed in the ground, and being kept up all the day wet or fine, the Court had no difficulty in holding that the bookmaker was using a "place" within the Act. Now, to come back to the question I have to decide, was it the intention of the parties that this betting business was to be carried on at a "place" within the meaning of the Betting Act, and did the plaintiff contemplate that it would be carried on by means contravening the rules of Tattersall's inclosure? If the defence is to succeed, I must find that the plaintiff did so intend. On this point the materiality of the use of the box is now evident, and the evidence of the plaintiff is important. I am satisfied on the evidence that some of the larger bookmakers —the "big men," as the defendant called them—do carry on a bookmaking business in Tattersall's inclosure without violating the statute, though in many cases some other cunning bookmakers carry on their business in the way described by the defendant, so as to bring it within the cases that I have been referred to. On the evidence I hold that it has not been made out that the plaintiff did intend that this business should be carried on illegally, and, consequently, I decide that this second defence fails.

There was a third defence that might have been raised, namely, that the plaintiff was aware that this business was being carried on by the defendant in contravention of the statute; but no such case was made, or attempted to be made, against him. At the end of his able argument Mr. Younger suggested that some question might arise on the taking of the

(1) [1896] 1 Q. B. 295. (2) L. R. 3 Ex. 137.
(3) L. R. 9 C. P. 339.

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account, from the fact that some particular winnings might have been earned by illegal practices. I will leave that question—on which there seems to be no authority—open till it arises on the taking of the account. (1) The result is, the plaintiff is entitled to the account claimed with the costs of the action up to and including the trial.

Solicitors: *T. H. Philpots, for T. Platts, Blackburn; Radford & Frankland, for Bowden & Widdowson, Manchester.*

W. C. D.

CHITTY J. 1896 *Feb.* 19.

SANGUINETTI *v.* STUCKEY'S BANKING COMPANY (No. 2).

[1888 S. 232.]

Practice—Foreclosure—Account—Bankrupt Mortgagor—Assessed value of Security—Special Circumstances—Chief Clerk's Certificate.

Any special circumstance or fact affecting the amount due from the mortgagor to the mortgagee in a foreclosure action—such as a valuation of the security in bankruptcy—should be pleaded, or brought to the attention of the Court, before the usual foreclosure judgment is made, in order that a direction may be given to the chief clerk to have regard, in taking the account, to such special circumstance or fact; if this is not done at the trial no such question can be subsequently raised on taking the account.

ADJOURNED SUMMONS.

This was an application by the trustee in bankruptcy of a mortgagor, to set aside or vary the chief clerk's certificate in a foreclosure action by bringing in further evidence and by adding a declaration that the applicant was entitled to redeem the securities of the plaintiff, the mortgagee, upon payment of the value thereof as assessed by the plaintiff in his proof in the bankruptcy.

The material facts were shortly as follows:—

In March, 1883, the plaintiff held two equitable charges in writing on the life interest of one C. A. Messiter in certain real estates in the county of Somerset.

In February, 1885, C. A. Messiter was adjudicated bankrupt

(1) Cf. *Sharp* v. *Taylor*, 2 Ph. 801.—F. P.

on the petition of the plaintiff, and the applicant, T. I. Denman, was appointed trustee.

In March, 1885, the plaintiff filed a proof in the bankruptcy against C. A. Messiter for 3151*l.*, and valued his securities at 2400*l.*, and on that footing was allowed to vote, and did vote, in the subsequent proceedings in the bankruptcy.

In January, 1888, the plaintiff commenced the present foreclosure action to enforce his equitable charges, and shortly afterwards a receiver of the rents and profits of the real estates was appointed.

In June, 1888, a settlement of March 12, 1883, by which 800*l.* a year was charged on the real estates of the bankrupt in favour of his wife and children, and which had priority over the plaintiff's charges, was set aside as "void as against the trustee," and by this means a sum of 4800*l.*, representing rents and profits, had been received by the receiver, and was in court to the credit of the action at the time the foreclosure judgment was made.

In November, 1894, the action was heard, when the plaintiff obtained a decision that he was entitled to the benefit of the order in bankruptcy setting aside the settlement of March, 1883 (1), by which the value of the plaintiff's security was enormously increased.

In December, 1894, a foreclosure judgment was drawn up which contained a declaration as to the effect of the setting aside of the settlement of 1883; a declaration that the plaintiff was entitled to a charge under his two securities (by one of which he was to get interest at 60 per cent.); a direction for an account of what was due to the plaintiff for principal and interest under his two charges, after giving credit for a sum of 3528*l.* which the plaintiff was to receive on account out of the 4800*l.* then in court; in other respects the judgment was in the common form.

On November 8, 1895, the plaintiff's proof was formally admitted in the bankruptcy, and on November 12, 1895, the trustee tendered the plaintiff the sum of 2400*l.*, the assessed value of the securities, which the plaintiff declined to receive.

(1) See S.C. [1895] 1 Ch. 176.

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On December 17, 1895, the chief clerk's certificate was signed: by this a very large sum was certified as still owing to the plaintiff on his securities.

The facts as to the valuation by the plaintiff of his securities in March, 1885, were not brought to the attention of the Court when the foreclosure order was made.

The trustee in bankruptcy now applied by summons in the action to discharge or vary the chief clerk's certificate in the manner already stated.

During the hearing it was stated on behalf of the trustee in bankruptcy that evidence as to the previous valuation of his securities by the plaintiff had been tendered to the chief clerk before the certificate was signed, and that he had declined to receive it. His Lordship sent for the chief clerk for information on this point with the result stated in the judgment.

Farwell, Q.C., *H. Reed, Q.C.*, and *Fossett Lock*, for the trustee in bankruptcy. The account directed under the usual foreclosure order is an account of what is due to the mortgagee, having regard to all the circumstances. Suppose a mortgagee had released part of the debt, or suppose there was a settled account, the mortgagee ought to be allowed to bring such matters to the attention of the chief clerk on the taking of the account; the trustee was entitled to redeem at the price put upon the securities by the plaintiff himself, and for less than the subsequent incumbrancers; and surely such an important fact as this ought to be regarded in taking the account. In *Knowles* v. *Dibbs* (1), which was for foreclosure against a bankrupt mortgagor, a direction was inserted in the order that the defendant, the trustee, was entitled to redeem at the assessed value of the security and therefore for less than the other mortgagees; the form of the order is given in Seton, 5th ed. Vol. II. p. 1628. It will work a great injustice on mortgagors if they are not allowed to bring forward matters like this at any time before absolute foreclosure. The order cannot have been intended to prejudice any right in the bankruptcy to redeem under the Bankruptcy Act, 1883, Sched. II., r. 12 (*a*), at "any

(1) 37 W. R. 378.

time" before foreclosure absolute. On one of these securities the plaintiff gets 60 per cent. interest, and on behalf of the other creditors we want the certificate varied and the account taken on the footing that the previous proceedings in bankruptcy are to be regarded.

Levett, Q.C., and *G. Henderson*, for the plaintiff. This point about the valuation of the security was deliberately not pleaded, because at that time it would not have been worth the trustee's while to redeem the plaintiff even at 2400*l.* Now our security has increased in value, he wants to redeem. It is now too late. The point should have been raised when the order was made, when a special direction to the chief clerk might have been inserted.

After a foreclosure judgment it is too late to redeem: *Ex parte Norris.* (1)

Farwell, Q.C., in reply.

CHITTY J., after stating the facts and the form of the foreclosure order of December, 1894, continued:—Now the question that has been raised by this summons clearly might have been raised, and ought to have been raised, at the trial. The account directed is in the common form for principal and interest; and if there were any special matter affecting the account there should have been a declaration inserted in the order directing the chief clerk, who was only taking an ordinary account, to have regard to some particular circumstances and facts. Mr. Farwell put several illustrations in support of his argument that he was entitled to redeem now for 2400*l.* That argument is wholly inconsistent with the judgment itself, on the face of which the plaintiff got 3528*l.* on account. The point was not raised on behalf of the trustee, who was a defendant, and I am entitled to consider that what Mr. Levett says is correct, namely, that the defendant deliberately abstained from raising it then; but perhaps that point is not very material. I take it that he did not raise this point at the trial, and if he had, there would then have been a declaration limiting the account in this way—an account of what is due under and by virtue of the charges, regard being had to the plaintiff having valued his security in

(1) 17 Q. B. D. 728.

CHITTY J. 1896 SANGUINETTI v. STUCKEY'S BANKING COMPANY (No. 2).

bankruptcy at the sum of 2400*l*. It seems to me that so far from involving any injustice upon mortgagors generally, as was contended by the defendant, I should be inflicting on mortgagees a great injury by acceding to such a contention as this. Here the mortgagee gets the benefit of an order of the Court that an account is to be taken of what is due on the charges; and there is nothing on the face of the order to cut it down. I quite agree that the object of the account is to find out what is justly owing and what is justly due, and in taking the account the mortgagor can always shew what he has paid on account of either principal or interest. I agree that settled accounts are not disturbed; but I do not agree, and there is no precedent for it, that a defence of this kind, which was not brought forward at the right time, can be brought forward during what I may term the mechanical operation of taking an ordinary account. Therefore, on the substance of the question, there being no authority to the contrary, or none which touches the point, except merely the direction I gave in the undefended case of *Knowles* v. *Dibbs* (1), that some words should be put in the order to the effect I have already mentioned, I hold that it is too late, after the judgment has gone, for the defendant, the trustee in bankruptcy, to raise this defence. I therefore decide the question against him upon the merits; but I consider, after what my chief clerk has told me, and after examining his notes, that the defendant is otherwise too late to raise the point. It appears that this question was not raised till after the certificate had gone. That is only a technical reason, and I prefer to decide the case on the merits in the way in which I have done; but certainly I shall not give leave to the defendant in a case of this kind to bring forward a point after the certificate has gone, by putting in additional evidence in order to delay the plaintiff. There is no equity in the defendant as regards the 60 per cent. That I decided at the trial. The law allows 60 per cent., and I have no right to say the law is wrong. I therefore refuse the summons with costs.

Solicitors: *Rowcliffes, Rawle, & Co., for J. Trevor Davies, Yeovil, Somerset; Richard Furber.*

(1) 37 W. R. 378.

W. C. D.

NORTH J.
1896
Jan. 25.

In re BOWES.
EARL STRATHMORE *v.* VANE.

[1895 B. 5880.]

Will—Construction—Legacy to Plant Trees.

A bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life:—

Held, primarily for the benefit of the owners for the time being, and to belong to persons entitled to the estate absolutely.

JOHN BOWES, the testator in this action, died in October, 1885, having by his will made the following bequest:—

"I bequeath to my trustees the sum of 5000*l.* sterling upon trust to expend the same in planting trees for shelter on the Wemmergill estate being part of my settled estates. If I shall have designated in my lifetime the places where such trees should be planted then I desire my trustees and trustee to plant the same in the places which I shall have designated; but if I shall not have designated the places then I desire my trustees and trustee in the place and manner of planting such trees to have regard to the wishes of the person for the time being entitled to the possession of the said Wemmergill estate. I have long had the intention of planting trees on the Wemmergill estate for the improvement thereof and I consider that Scotch fir is the best tree to be used."

The action was commenced shortly after the death of the testator for the administration of the testator's real and personal estate.

This was a petition to obtain the direction of the Court as to the application of a sum of 5069*l.* 17*s.* 11*d.* New Consols, and a small sum of cash standing in court to the credit of the action to a separate account entitled, "The legacy to the trustees of testator's will upon trust for planting on the said Wemmergill Estate." The sum in court represented the legacy of 5000*l.* and some income in respect of the same; nearly all the duty had been paid on the sum in court.

At the date of his will and at the date of his death the

NORTH J. 1896 *In re* BOWES. EARL STRATHMORE *v.* VANE.

testator was tenant for life of the Wemmergill estate. On the death of the testator, Earl Strathmore, the plaintiff in the action, in default of issue of John Bowes, became tenant for life of the Wemmergill estate, with remainder to his eldest son, Lord Glamis, in tail, subject to certain incumbrances. The estate had been disentailed and resettled; it was still limited to Earl Strathmore for life with remainder to Lord Glamis in tail, subject to certain incumbrances on the inheritance, and also to a mortgage on the Earl's life interest in favour of the Royal Bank of Scotland.

There was evidence of foresters before the Court to the effect that only seventy-five acres of the estate could be planted to advantage, and that the expense of such beneficial planting would be about 800*l.*

Earl Strathmore was the sole petitioner; the respondents were Lord Glamis, the surviving trustee and executor of the testator's will, and the Royal Bank of Scotland.

The petition asked for application of the sum in court in payment of the small amount of duty not paid, in payment of the costs of the petition, in payment of the sum in court representing income to the petitioner, and the balance representing capital to Earl Strathmore and Lord Glamis.

Crackanthorpe, Q.C., and *S. Dickinson*, for Earl Strathmore. Where there is a bequest to lay out money on the estate, and it can be gathered from the will that the governing object of the bequest is to benefit the persons entitled, the money bequeathed need not be laid out on the estate if there are persons absolutely entitled, but may be paid over to them. We submit that on the construction of this will the object of the testator was to benefit the persons successively entitled: *Palmer* v. *Flower* (1); *Re Skinner's Trusts* (2); *Lockhart* v. *Hardy* (3); *Earl of Lonsdale* v. *Berchtoldt.* (4) We ask that, on the execution of a disentailing assurance and the production of the consent of all incumbrancers which can be obtained, the legacy may be paid to the petitioner and Lord Glamis.

(1) L. R. 13 Eq. 250.
(2) 1 J. & H. 102.
(3) 9 Beav. 379.
(4) 3 K. & J. 185.

G. A. Watson, for Lord Glamis.

Foster Cooke, for the mortgagees of the life interest.

W. B. Heath, for the surviving executor. There is no expression in the will of an intention to benefit the successive owners. The primary object of the testator was to beautify the estate. It was not intended necessarily to lay out the whole of the money in planting trees. A discretion was given to the trustees, and what is not applied for planting trees falls into residue: *Cowper* v. *Mantell* (1); *In re Ward's Trusts*. (2) The bequest is in the nature of a bequest for a public purpose, such as to plant trees in Hyde Park.

NORTH J. The case is shortly this. Mr. Bowes, being tenant for life, but nothing more, speaks of this estate as part of his settled estates, which in a sense it was. His interest ceased at his death, and then the estate went to the Earl of Strathmore for life, with remainder to his issue in tail; and that course of limitation is still subsisting, though under a resettlement.

That being so, the will of Mr. Bowes contains this gift: "I bequeath to my trustees the sum of 5000*l.* sterling upon trust to expend the same in planting trees for shelter on the Wemmergill estate being part of my settled estates." Pausing there, I think there is as clear a trust as well can be. The will does not give them an option or choice about the matter; it directs that that sum is to be spent by them in planting trees upon the estate. I can entertain no doubt about the intention. It is common ground that the estate would hold far more trees than could possibly be put upon it for that sum; though, on the other hand, it is said it would be a very disadvantageous mode of spending that sum to apply it in planting trees even upon any part of the estate; for some reasons applicable to one part, and some to another, it is not the interest of any one that trees should be planted to so great an extent upon that estate. Still, there is a direct trust to plant. Then the testator says: "If I shall have designated in my lifetime the places where such trees should be planted then I desire my trustees and

(1) 22 Beav. 231. (2) L. R. 7 Ch. 727.

NORTH J. 1896 *In re* BOWES. EARL STRATHMORE *v.* VANE.

trustee to plant the same in the places which I have designated; but if I shall not have designated the places then I desire my trustees and trustee"—not for all purposes, but—"in the place and manner of planting such trees to have regard to the wishes of the person for the time being entitled to the possession of the said Wemmergill estate"; so that he considered that, though the estate was not his after his death, yet he still would have some power of control over it in giving a direction as to the places where trees should be planted by his trustees after his death; but, if he had not done so, regard should be had to the wishes of the person for the time being entitled in possession. Of course, it was not the testator's own estate; nothing could be done at all without consulting the person who was in possession of the estate, and who would have the opportunity of saying that unless the trees were planted where he liked they should not be planted at all. The 5069*l.* New Consols is the amount representing the fund. The question is to whom is it to belong. Lord Strathmore being the present tenant for life, and his eldest son being tenant in tail and having attained twenty-one, they are together now capable, if Lord Glamis executes a disentailing deed, of dealing with the whole estate exactly as they like. I do not forget that there are prior charges upon it; but the consents of all persons with prior charges upon it have been obtained, or will be proved to be obtained, before the order is drawn up.

Then, the sole question is where this money is to go to. Of course, it is a perfectly good legacy. There is nothing illegal in the matter, and the direction to plant might easily be carried out; but it is not necessarily capable of being performed, because the owner of the estate might say he would not have any trees planted upon it at all. If that were the line he took, and he did not contend for anything more than that, the legacy would fail; but he says he does not refuse to have trees planted upon it; he is content that trees should be planted upon some part of it; but the legacy has not failed. If it were necessary to uphold it, the trees can be planted upon the whole of it until the fund is exhausted. Therefore, there is nothing illegal in the gift itself; but the owners of the estate now say:

"It is a very disadvantageous way of spending this money; the money is to be spent for our benefit, and that of no one else; it was not intended for any purpose other than our benefit and that of the estate. That is no reason why it should be thrown away by doing what is not for our benefit, instead of being given to us, who want to have the enjoyment of it." I think their contention is right. I think the fund is devoted to improving the estate, and improving the estate for the benefit of the persons who are absolutely entitled to it. If it had been for the benefit of or improving the estate by way of making it part of a public park or something of that sort, the case might possibly have been different. I do not think that a gift to plant Hyde Park is really a case in point. Here it is to be planted, not as part of a public trust, but for the benefit of the owners of the estate, the owner in possession being the person whose wishes are to be considered, not merely saying whether he will give leave for the planting or not, but in considering where the trees shall be planted. I consider it was for the benefit of the estate, and the persons who, for the time being, are entitled to the estate, that that direction was given.

Then, is there a mere power to the trustees to lay out a sum, or is there a trust to lay it out? I think there clearly is a valid trust to lay out money for the benefit of the persons entitled to the estate. If that be so, the case comes within the class where there is not a mere power to lay out the money—in which case the money may go or not according to whether the power is exercised or not. In the present case there is a trust to lay it out; and, in my opinion, the persons entitled to it are entitled to have the money, whether it actually is laid out or not. The case seems to me to come exactly within the cases of *Earl of Lonsdale* v. *Berchtoldt* (1) and *Re Skinner's Trusts*. (2) I think that the remarks of Lord Langdale in *Lockhart* v. *Hardy* (3) are also exactly in point; and the observations in the case of *In re Ward's Trusts* (4) also, which are strongly the same way.

I think, therefore, that upon proving that all the proper

(1) 3 K. & J. 185.
(2) 1 J. & H. 102.
(3) 9 Beav. 379.
(4) L. R. 7 Ch. 727.

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consents have been got, and that the disentailing deed has been executed by Lord Glamis, I can make the declaration that they are entitled.

Solicitors for Earl Strathmore and Lord Glamis: *Young, Jones & Co.*

Solicitors for mortgagees: *Minet, Harvie, Smith & May.*

Solicitors for executors: *Western & Sons.*

D. P.

NORTH J. 1896 *Jan.* 29.

In re RICHARDSON. MORGAN *v.* RICHARDSON.

[1895 R. 670.]

Executor—Residue—Appropriation of Assets.

Executors may appropriate specific assets to a trust share of residue, or transfer them to the legatee of a share, in advance of final division.

Executors entitled to two-fifths of a residue, the other three-fifths being settled, before final division transferred securities, since risen in value, at the market price, to one of themselves as part of his fifth share:—

Held, that, though there was no corresponding appropriation in respect of the settled shares, the transaction was valid against the beneficiaries.

CHARLES RICHARDSON, the testator in this summons, died on August 9, 1892, having made a will by which he appointed his son Charles William Richardson and his son-in-law Percy Fenwick executors and trustees of his will.

His will continued as follows: "I give and devise one-fifth part or parts of all my property subject only to debts and legacies to my son Charles William Richardson to his sole use and benefit for ever absolutely. In like way I hereby give to my son Walter Norman Richardson one-fifth part or parts to his sole use and benefit for ever absolutely, and all the remainder of my estate of every kind after fulfilling the above instructions I leave to the said Charles William Richardson and Percy Fenwick upon trust for such of my four daughters as may survive me the four being Emily Flora who is now Mrs. P. Fenwick, Louise Grace, Alice Maude now Mrs.

Barnard, Hilda but not Edith and all the capital or sums of money which by these presents becoming due to my four daughters aforenamed I desire shall be secured to and for them for life such principal or capital to go to their lawful children in equal proportions, or should they die without issue then to revert to my surviving daughters in equal proportions excepting the said Edith. And should either of my executors object to act herein or die then in such case I do appoint my son Walter Norman Richardson to act in their stead in all things, and as regards the nature or quality of the securities in which I desire my executors and trustees to invest the remainder or residue of the trust funds I will that one-half of the remainder shall be invested in Consols Reduced or New Annuities and no other bank shares or commercial undertakings. The other half or moiety of the remainder may remain as at present invested in the City of London Brewery Company either in preference shares or stock. My freehold property 'Forwood' may be either sold or let on lease as my executors may deem best." The will contained no express power to appropriate specific assets to legatees.

The testator's daughter Emily Flora Fenwick predeceased him. His daughter Hilda was now the wife of William John Lewis Morgan. His son-in-law Percy Fenwick renounced probate, and his will was proved by the testator's two sons.

The testator's house, Forwood, was not able to be sold till April, 1894, and the final division of his estate was made on December 31, 1894. In the early part of 1894 advances were made to Charles William Richardson and Walter Norman Richardson on account of their shares of capital, on which they were charged interest at the rate of 4 per cent. per annum in taking the final accounts. These advances amounted to 6500*l.* and 6483*l.* respectively. Part of the testator's estate at the time of his death consisted of 18,586*l.* 10*s.* 10*d.* ordinary stock in the New City of London Brewery Company, Limited; of this 7140*l.* was, on December 31, appropriated to the three-fifths of the residue, to be held on trust for the testator's daughters and their children at the then market price of 160 per cent., the stock so appropriated being valued at 11,424*l.*, the same

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value as that of the other securities appropriated to that trust fund.

The rest of the New City of London Brewery Company stock had previously been disposed of, except a very small sum, in the months of January, February, and March, 1894. Part of the advances made to Walter Norman Richardson on account of capital was effected by transferring to him 3600*l.* New City of London Brewery Company, Limited, and charging him in the capital account with the market value of the same at 146*l.* 15*s.* for every 100*l.* stock. The other advances to the executors on account of capital were made in cash.

This was an originating summons by Mrs. Morgan to have the appropriation of the testator's assets readjusted. She sought to have them readjusted on the footing that the executors ought to have appropriated a proportionate amount of the brewery stock to the three-fifths of the residue to be held in trust when the advances were made to the executors themselves; and asked to have the adjustment made by taking the value of the brewery stock appropriated to the trust at the market value in January, 1895.

Macaskie, for the plaintiff, Mrs. Morgan. When the executors made advances to themselves and appropriated a portion of the brewery stock to one of themselves, they ought to have made a corresponding appropriation of brewery stock to the trust fund, to the extent of the amount of stock authorized by the will so to be held.

William Barnard, for Mrs. Barnard.

Begg (*Swinfen Eady, Q.C.*, with him), for the executors. The executors could not lawfully, till final division, appropriate anything other than Consols to the trust fund: *Stewart* v. *Sanderson*. (1) The power of trustees to appropriate securities to a trust has not been extended by the extension of the powers of trustees to invest under s. 3 of the Trust Investment Act, 1889: *In re Owthwaite*. (2) Executors have power to appropriate a specific part of property to one of several persons among whom the property is divisible, and the person to whom

(1) L. R. 10 Eq. 26. (2) [1891] 3 Ch. 494.

the appropriation is made is not accountable to the others if part of the unappropriated property is lost: *In re Lepine.* (1)

Macaskie, in reply.

NORTH J. I do not see my way to grant the relief asked for. The case is shortly this: The testator gave his residue in fifths: one-fifth he gave to each of his sons, three-fifths he gave to his daughters for life with remainder for their children. He had a large holding in the New City of London Brewery Company, which he evidently thought a good deal of as an investment in his lifetime, and approved of as an investment by his will. In his will he made the following direction: "and as regards the nature or quality of the securities in which I desire my executors and trustees to invest the remainder or residue of the trust funds"—that is, the three-fifths given on trust for the daughters and their children—"I will that one-half of the remainder shall be invested in Consols Reduced or New Annuities and no other bank shares or commercial undertakings." That was an express declaration as to the investment of half the settled shares. Then he proceeds: "The other half or moiety of the remainder may remain as at present invested in the City of London Brewery Company either in preference shares or stock."

At the time of the testator's death much more than one-half of the estate was invested in the stock of the brewery company; so it was necessary for the executors to realize a considerable portion of it even if they were to exercise their discretion of allowing as much as they properly could under the words of the will to remain invested in the stock; and in course of getting in the estate, after more than a year had elapsed, but before the period of final division, portions of the stock were sold, and each of the sons received a part of their one-fifth. As to one son, he was paid in cash out of the proceeds of the part of the estate realized. The amount he received by way of advance was less than the whole amount of his share; so that in the final division he would be entitled to a further payment. The other brother was dealt with somewhat differently: instead of there being a sale of stock by the executors and payment to him of the

(1) [1892] 1 Ch. 210.

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proceeds, he wished to have the stock itself without a sale; and the executors transferred an amount of stock to him at the current price. If a sale had taken place, and he had received the proceeds, of course, he could have immediately reinvested in the stock. It is quite true that there would have been some little loss by double brokerage; but that is neither here nor there. If there were no other complaint, no complaint could be made because the transfer was made direct.

What happened is this: the sums received in advance were less than the shares the sons were entitled to. Therefore they were still entitled to a part of the unappropriated residue of the estate. A considerable part of that consisted of this brewery stock, which had in the meantime risen in value, and the estate was so much the better, and the amount they had yet to receive was thereby increased. The son to whom the stock had been transferred had also been benefited in another way: he had been charged in the final adjustment of accounts with interest at 4 per cent. per annum on the value of the stock transferred to him; while on the stock itself he had received a larger sum by way of dividend: therefore he received a somewhat larger income than was paid to the others. It is very important to bear in mind that there was no suggestion of mala fides; everything was fairly done; there might have been a mistake, nothing more. It was said that when the advances were made on account of the executors' own shares a corresponding amount of stock to that appropriated to their two-fifths ought to have been appropriated and set apart for the three-fifths to be held on trust, and, as that was not done, the unappropriated balance of the estate ought at the final division to be distributed in such manner as to produce the same effect as if a proportionate part of the stock had been appropriated to the daughters' shares when the advances to the sons were made. I have no doubt that such an appropriation would have been good provided the amount of stock appropriated did not exceed one-half the shares of the daughters in value; if it did exceed that value, it would have been good to the extent of the half value, and bad as to the excess. It has been suggested that there could be no appropriation of this stock to the daughters' shares till the final

division. I do not assent to that. I have heard no authority and see no reason for such proposition. I see no reason why, if part of the estate can be distributed before the final division, it should not be distributed among all the shares, proper investments being appropriated to the trust shares, without waiting for the final division; but the difficulty I see in the way of Mr. Macaskie is that, although I think it might have been better for the executors to have appropriated stock to the trust shares, I do not see that it was incumbent on them to do so. Bearing in mind that there were ample assets to make provision for the trust shares, I cannot see that the executors were bound to make an appropriation to those shares, and I cannot say that the estate is now to be divided on the footing of what I hold it was not incumbent on them to do.

I dismiss the summons without costs: the costs will come out of the estate.

Solicitors for Mrs. Morgan: *Nicholson, Graham & Graham, for Lycett & Co., Manchester.*

Solicitors for Mrs. Barnard: *Twisden & Co.*

Solicitors for executors: *Western & Sons.*

D. P.

In re SHARLAND. KEMP *v.* ROZEY.

[1895 S. 568.]

Will—Construction—Legacy to Persons who should have been in Testator's Employment for more than a Specified Time.

A testator directed his trustees "to pay to each man who shall have been in my employ over ten years the sum of 10*l.* for each year's service beyond the said ten years":—

Held, that a man who had been in the testator's employment for fifteen years, but had left his employment before the date of the will, and was not in his employment at the time of his death, was entitled to a legacy of 50*l.*

SUMMONS by Henry Kemp and Richard Letts, two of the executors and trustees of the will of H. H. Sharland, who died on November 28, 1894, asking for the determination by the

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Court of (inter alia) the following question: whether the defendant Henry Duggan, who had been in the testator's employment from the year 1868 to the year 1883, was entitled under the will to a legacy of 50*l.*, though he was not in the testator's employment either at the date of the will or at the time of the testator's death.

By the will, dated December 12, 1889, the testator, who carried on business as a wholesale optician in London and in Paris, appointed the defendant George Rozey and the plaintiffs to be the executors and trustees of his will. He bequeathed to his manager, the plaintiff Kemp, the goodwill of his business, and also his stock-in-trade, cash in his hands, and business debts, for his own use absolutely, "but subject to the payment of all business liabilities, and to the payment within twelve months after my decease to each man employed in my warehouse in Thavies Inn, London, at the time of my decease, and who shall have been in my service for ten years, the sum of 50*l.*, and to each of the other men in my service at my decease the sum of 10*l.*, and to each boy in my service and employed in my said warehouse at my decease the sum of 5*l.*" And the testator directed his trustees "to pay to Robert Camp if in my service at the time of my death, the sum of 1000*l.*, in addition to what he may receive from the said Henry Kemp out of my business estate; but if the said Robert Camp is alive at my death, but not in my employ, I direct my trustees to pay to him the sum of 500*l.* in lieu of the before-mentioned 1000*l.*" And the testator directed his trustees "to pay to each man who shall have been in my employ in London over ten years the sum of 10*l.* for each year's service beyond the said ten years."

Henry Duggan had been in the testator's employ in London for fifteen years—from January, 1868, to February, 1883. He then left the testator's employ, and never returned to it. He claimed under the above clause a legacy of 50*l.*, and the question was whether he was entitled to it.

Swinfen Eady, Q.C., and *Tanner*, for the plaintiffs, submitted the question to the Court.

Medd, for residuary legatees. The reasonable construction

of the clause is that the gift was intended to apply only to persons who were in the testator's employ at the date of the will, or who should become employed by him after that date, and should continue in his employment for more than ten years: *Parker* v. *Marchant.* (1)

Costelloe, for a defendant in the same interest. The will was somewhat informal, in fact only a draft, and the intention must have been that this clause should be limited in the same way as the prior gift to persons in the testator's employ.

Curtis Price, for Henry Duggan. The gift is to each man of whom it could be predicated that he had been over ten years in the testator's employ. This clearly includes the claimant. The omission of the words "at the time of my decease," which occur in the prior clause, makes a pointed distinction between the two clauses. [He referred to *In re Marcus.* (2)]

Vernon Smith, Q.C., and *Bardswell*; and *L. Ryland*, for other parties.

NORTH J. I do not see how I can exclude Henry Duggan from the class who are to take the benefit of this gift. When the testator intends to limit a gift to persons who shall be in his employment at the time of his death his intention to do so is clearly expressed, as, for instance, in the prior gift of 50*l.* "to each man employed in my warehouse at the time of my decease, and who shall have been in my service for ten years." In the clause with which I am now dealing the words are, "to pay to each man who shall have been in my employ over ten years the sum of 10*l.* for each year's service beyond the said ten years." It is said that this is not a formally drawn will, but only a draft will, executed with a view to the subsequent preparation and execution of a more formal instrument, and that I ought to assume that the testator intended the same limitation of this gift as of the prior one which I have read, though he has used different words. I decline to assume anything of the kind. If I were to make any assumption, it would be of the direct opposite. But I base my decision upon the words of the particular clause, which are not restricted in the way suggested.

(1) 1 Y. & C. Ch. 290, 299. (2) 56 L. J. (Ch.) 830; 57 L. T. (N.S.) 399.

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The gift is "to each man who shall have been in my employ over ten years," and there is nothing in these words to exclude the claimant Henry Duggan, who had been in the testator's employ over ten years.

Solicitors: *Letts Brothers; Maples, Teesdale & Co.; A. Herbelet; Yarde & Loader; Woodcock, Ryland & Parker.*

W. L. C.

NORTH J. 1896 *Feb.* 4.

Ex parte LONDON COUNTY COUNCIL. *Ex parte* VICAR OF CHRIST CHURCH, EAST GREENWICH.

[1892 L. 4588.]

Church Building Acts—Church Land taken by Public Body—Application of Purchase-money—Power of Ecclesiastical Commissioners—Church Building Act, 1840 (3 & 4 *Vict. c.* 60), *s.* 19.

A piece of land having been in 1846, under the authority of the Church Building Acts then in force, voluntarily granted in fee to the Church Building Commissioners for ecclesiastical purposes, a church was built thereon. The whole of the land was inclosed, and in 1849 the church was consecrated. So much of the land as was not actually occupied by the church was not consecrated. In 1891 the London County Council, under their statutory powers, purchased part of the unconsecrated inclosure, and the purchase-money was paid into court under the Lands Clauses Consolidation Act, 1845. The purchased land was afterwards conveyed by the vicar to the county council. Upon a summons by the vicar for payment out:—

Held, that, notwithstanding the consecration, the Ecclesiastical Commissioners (as the successors of the Church Building Commissioners) had power, under s. 19 of the Church Building Act, 1840, with the consent of the original donor of the land, to direct that the purchase-money should be applied to any of the purposes mentioned in that section:

Held, also, that the payment of part of the principal money remaining due upon a mortgage to the Governors of Queen Anne's Bounty of the glebe, profits, and emoluments of the vicarage, made by a former vicar to secure the repayment of a loan made to him by the governors for the purchase of a vicarage-house, was an ecclesiastical purpose within the meaning of s. 19.

SUMMONS by the vicar of Christ Church, East Greenwich, asking that a sum of 772*l.* 4*s.* Consols in court might be sold,

and that, after payment of costs not payable by the London County Council, the proceeds of sale might be applied in payment to the Governors of Queen Anne's Bounty of the sum of 250*l.*, being part of a balance of 380*l.* due to them for principal under an indenture of mortgage of August 10, 1882, and that the residue of the proceeds of sale might be paid to the vicar, he undertaking to apply the same in payment for certain repairs to the parish church provided for by articles of agreement dated September 8, 1883.

By a deed-poll dated August 19, 1846, the then trustees of Morden College, under the authority and for the purposes of the Church Building Acts, freely granted a piece of land at East Greenwich to hold to Her Majesty's Commissioners for Building New Churches, and their successors, for the purposes of the said several Acts, and to be devoted when consecrated to ecclesiastical purposes for ever.

On a part of the land thus granted the church called Christ Church was erected, and it was, on June 19, 1849, consecrated by the then bishop. The whole of the land was inclosed, but the part which was not actually occupied by the church was not consecrated.

In 1882 the then vicar borrowed a sum of 600*l.* from the Governors of Queen Anne's Bounty for the purpose of purchasing a house for a vicarage-house; and on August 10, 1882, he executed a mortgage to the governors of the glebe, tithes, rents, rent-charges, and other profits and emoluments of the vicarage, to secure the repayment of the 600*l.* and interest thereon at 4 per cent. per annum, it being provided that the capital should be repaid by yearly instalments of 20*l.*, on August 10, 1884, and on August 10 of every successive year, until the whole should be repaid. At the time when the summons was issued eleven of these annual instalments had been paid to the governors, leaving a balance of 380*l.* due to them in respect of capital.

In 1891 the London County Council under their statutory powers purchased from the then vicar a portion of the unconsecrated inclosure surrounding the church. The compensation to be paid by the county council was determined, by arbitration

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under the provisions of the Lands Clauses Consolidation Act, to be the sum of 1192*l.*, and this sum was paid into court; and on December 8, 1892, the land thus purchased was conveyed by the then vicar to the county council in fee. On December 22, 1892, on the application of the then vicar, an order was made that 442*l.*, part of the money in court, should be paid out to him for the purpose of providing the cost of certain works, and that the residue, amounting to 750*l.*, should be invested in Consols. This sum was invested in the purchase of 772*l.* 4*s.* Consols, the sum to which the present summons related.

On June 24, 1895, the Ecclesiastical Commissioners executed a document by which they, purporting to exercise the powers conferred upon them by s. 19 of 3 & 4 Vict. c. 60, and with the consent of the successors of the donors of the piece of land conveyed to them under the last-mentioned Act, and part whereof was then represented by the sum of 772*l.* 4*s.* New Consols, did thereby direct that the said sum of New Consols should, subject to the payment thereout of such costs as the Court should direct to be paid out of the fund, be applied for the following charitable or ecclesiastical purposes: (1.) in payment of 250*l.*, part of the 380*l.* then remaining due for principal upon the mortgage to Queen Anne's Bounty, and (2.) as to the residue thereof in or towards payment for the repairs to the parish church of Christ Church provided for by the articles of agreement of September 8, 1893. And the commissioners authorized the payment of the said residue to the vicar on his undertaking so to apply the same. This document was also executed by the then trustees of Morden College, as the successors of the donors of the land, and they thereby consented to the above-mentioned application of the money.

Dibdin, for the vicar. This land (now represented by the money paid into court) was not required for the site of the church, and therefore, under (1) s. 19 of the Church Building

(1) By 58 Geo. 3, c. 45, s. 33, the commissioners may accept any land proper for sites of additional churches, not exceeding in quantity what may be sufficient for building of a church, providing a churchyard, and making a proper access thereto, and every such site when conveyed to them, and the church erected thereon, and notice thereof given to the bishop, shall

Act, 1840, the Ecclesiastical Commissioners, with the consent of the original donors, had power to direct that it should be applied

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become for ever devoted to ecclesiastical purposes only; and also may accept land for a house for the incumbent which (on consecration of the church) shall vest in him.

By s. 51, they may sell such lands as shall not be wanted for the purposes of the Act.

By 59 Geo. 3, c. 134, s. 34, if any such lands happen to remain unconsecrated at the end of ten years, they shall be vested in the Crown, to be applied to the purposes for which they were acquired, unless or until some other provision shall be made by Parliament.

By 3 Geo. 4, c. 72, s. 34, "In every case in which any grant shall have been or shall be made of any land or ground, for any of the purposes of the said recited Acts or this Act, as a gift, or without any pecuniary consideration being paid for the same, and in which the commissioners shall determine not to apply such land or ground to any of the purposes of the said recited Acts or this Act, it shall be lawful for the said commissioners, and they are hereby authorized and empowered, to exchange any such land or ground for any other land or ground which may, in the judgment of the said commissioners, be more eligible for the purpose for which the same was given; or with the consent of the grantor or grantors thereof, or their heirs or successors, to apply such land or ground to any other ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent of the parish or place, or for the purpose of any parochial or charitable school, or any other charitable or public purpose relating to any such parish or place; or to reconvey, without requiring taking or receiving any pecuniary consideration for such re-conveyance, any such land or ground, or any part thereof, in case only a part of any such land or ground shall have been applied to the purposes of the said recited Acts or this Act, to the grantor or grantors thereof, or their heirs or successors; anything in the said recited Acts or this Act to the contrary notwithstanding."

By the Church Building Act, 1840 (3 & 4 Vict. c. 60), s. 19, "In every case in which any grant shall have been or shall be made of any land or ground to the said commissioners for any of the purposes of the said recited Acts or of any of them, either for a valuable consideration being paid for the same, (*sic*) and in which the said commissioners shall determine to apply a part only of such land or ground to any of the purposes of the said recited Acts or any of them, it shall be lawful for the said commissioners, and they are hereby authorized and empowered, with the consent of the grantor or grantors or donor or donors (as the case may be) of such land or ground, or of his, her, or their heirs or successors . . . . to apply any part of such land or ground which shall not have been or shall not be applied by the said commissioners for the purposes of the said recited Acts, or of any of them, to any other ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent or minister of the parish, place, or district in which such land or ground is situate, or for the purpose of any parochial or charitable school or any other charitable or public purpose relating to any such parish or place."

By 8 & 9 Vict. c. 70, s. 13, in all cases the freehold of the site of every

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to any other ecclesiastical purposes, and the purchase-money can equally be so applied. The land was given under the powers conferred by the Act 58 Geo. 3, c. 45. By virtue of s. 13 of 8 & 9 Vict. c. 70, upon the consecration of the church, the freehold of the site vested in the commissioners, and this vesting comprised the whole of the land originally acquired, even though it was not all consecrated: *Board of Works for Plumstead District* v. *Ecclesiastical Commissioners for England.* (1) But the power of the commissioners under s. 19 to direct the application of the land remains unaffected. The repairing of the church is clearly an "ecclesiastical purpose," and also a "public purpose relating to the parish." The payment off of the mortgage debt to Queen Anne's Bounty is a similar purpose, for the existence of the charge hampers the benefice.

Kenyon Parker, for the London County Council.

NORTH J. I think I can grant the application. [After reading s. 19 of 3 & 4 Vict. c. 60, his Lordship continued:—] It seemed to me at first that there might be a difficulty in directing under this section, just as there is a similar difficulty under s. 69 of the Lands Clauses Act, that the money arising from the sale of this land should be applied in payment of the instalments of principal due under the mortgage to Queen Anne's Bounty. But, on consideration, I think that s. 19 authorizes a wider application of the fund than s. 69 does.

The Court is not here dealing with part of the estate of the Church—not part of the estate belonging to the establishment, whether it is used for a church, churchyard, or vicarage, or any other such purpose—but it is dealing with the application of money representing land which has never been applied to any such purpose, but as to which it was only contemplated that

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church of which the commissioners shall accept a conveyance under the Acts (as to any church not yet consecrated, when the same shall be consecrated) shall vest in the incumbent.

By 19 & 20 Vict. c. 55, the duties, powers and authorities of the Church Building Commissioners were, from and after January 1, 1857, transferred to the Ecclesiastical Commissioners.

(1) [1891] 2 Q. B. 361.

it would or might be applied to such a purpose: and, when the ecclesiastical authorities had changed their minds about it, the land became (so to speak) a sort of windfall—not part of the estate, but an accretion to the estate which could be disposed of under s. 19. No doubt the commissioners might, under this section, have directed that the land should be used as part of the glebe, in which case it would, of course, continue for ever to be used for the benefit of the successive vicars; and it at first struck me that the purposes contemplated by s. 19 must be of such a character that the vicars in succession would have the benefit of the land, which would not be the case if the money now in question were applied in partly paying off a charge which otherwise the present vicar would, if he should live long enough, have to pay out of his own pocket, or which, if he should die before the charge was exhausted, some of his immediate successors would have to pay. But I think the words of s. 19 are not so limited. The power is to apply the land "to any other ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent or minister of the parish, place, or district in which such land or ground is situate." The commissioners consider that they have power to apply the money for the purpose which they have directed, and I have no doubt, from their saying so, that this is the best purpose to which it can be applied. In my opinion, this application is within the words which I have just read, and this construction is very much fortified by the following words of the section, which provide that the land may be applied, not only to the purposes which I have mentioned, but also "for the purpose of any parochial or charitable school, or any other charitable or public purpose relating to any such parish or place." Among the purposes authorized by these last words there might clearly be some from which the vicar would not derive any income whatever. I think, therefore, that the section has a larger meaning than was my first impression, and that the commissioners had power to give the directions which they have given. If they have the power, they are the persons to select the objects to which the money is to be applied. A large part of the fund will

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go to pay for repairs, which is clearly an "ecclesiastical purpose." In my opinion, the proposed payment to the Governors of Queen Anne's Bounty is also an "ecclesiastical purpose," and I must order the fund to be applied in accordance with the direction of the commissioners.

Solicitors: *Saw & Son; Solicitor to London County Council.*

W. L. C.

STIRLING J

1895

Nov. 6.

1896

Jan. 15.

In re CAREW.
CAREW *v.* CAREW.

[1889 C. 4289.]

Will—Construction—Legacy—"Legal Disability"—Fictitious bankruptcy of Legatee—Mortgage and Assignment by him—Defaulting Trustee—Charge on Beneficial Interest.

A testator after giving the income of his residuary estate to his wife for life, subject thereto gave a moiety of such estate to his son; but in case the son should at the death of the testator's wife be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," the testator gave over the same to his said son's wife and children.

Just before the death of the testator's widow, and while she was in extremis, the son, being heavily indebted, applied for and obtained a receiving order and an order for adjudication in bankruptcy against himself; but within three weeks afterwards both these orders were annulled on the ground that they never should have been made:—

Held, that the "legal disability" contemplated by the testator was not one arising simply from the voluntary act of his son, but one imposed by the law of the land; and that, although, primâ facie, bankruptcy would be a disability imposed by law, yet inasmuch as the bankruptcy of the son had been a mere contrivance on his part to procure a benefit for his wife and children, he was not under any real disability arising therefrom.

Before the death of the testator's wife the son had mortgaged and assigned all his interest under the will; and, in an action to administer the testator's estate, a sum of money found due from him as executor, in respect of assets he had received, was also charged upon his aforesaid interest:—

Held, that the disability which had thus arisen was due to his own voluntary acts, so that the gift over did not take effect.

ADJOURNED SUMMONS.

George Carew, a solicitor in London, made his will dated January 11, 1886, and thereby, after giving his wife a specific and a pecuniary legacy, proceeded: "And as to all other my worldly estate and property of every description I give the income arising therefrom to my said wife for her life, and subject thereto I give one equal moiety thereof to my granddaughter Jessie Carew, with liberty for my executors during her minority to apply for her education or otherwise the income

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arising therefrom, and any surplus income to be during her minority accumulated for her benefit. And, as to the other equal moiety thereof, and in case of the death under age of my said granddaughter then as to the entirety of my said worldly estate and property, I give the same subject as aforesaid to my son Henry George Carew; but if he should predecease either my said wife or me, or in case of his being, at the time of the death of the survivor of my said wife and me, under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit, I give the same subject as aforesaid unto his widow or wife and children (other than the said Jessie Carew), living at the death of the survivor of my said wife and me, to be made over to them respectively on their respectively attaining twenty-one, the income arising from the shares of such children to be in the meantime applied for their benefit. And I appoint my said wife and sons executors." On January 11, 1886, the testator died leaving a widow, and she and Henry George Carew proved the will.

On August 8, 1892, the usual judgment for the administration of the testator's estate was given in this action. On July 29, 1894, the chief clerk's certificate was made, finding a sum of 5188*l.* 16*s.* 10*d.* due from Henry George Carew.

On January 30, 1895, an order was made on further consideration, whereby Henry George Carew was ordered to pay the sum of 5188*l.* 16*s.* 10*d.* to the plaintiffs as the present trustees of the testator's will; and it was declared, without prejudice to any claim of the wife and children of Henry George Carew to or in respect of the share or interest (if any) given to Henry George Carew by the will of the testator, that the interest (if any) coming to Henry George Carew under the testator's will was liable to make good to the testator's estate the said 5188*l.* 16*s.* 10*d.*

Jessie Carew, in the will named, attained twenty-one, and married Charles Theodore Weston.

On March 16, 1895, Mrs. Carew, the widow of the testator, died. On the same day, and before the death of Mrs. Carew, a receiving order and an order of adjudication in bankruptcy were

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upon his own application made against Henry George Carew. On March 26 an order was, on the application of Mr. Weston, made staying proceedings in the bankruptcy until after April 4; and on April 4 a further order was made, whereby the receiving order and order of adjudication of March 16 and all subsequent proceedings were annulled on the ground, as expressed in the order, that the receiving order and order of adjudication ought not to have been made.

By deeds dated March 24, 1893, and June 2, 1893, Henry George Carew mortgaged his interest under the will to Francis Dashwood to secure two sums of 600*l.* and 300*l.* By a deed dated March 15, 1894, Henry George Carew and Emma his wife mortgaged their respective interests under the will to the Legal Reversionary Society to secure 100*l.* By a deed dated September 7, 1894 (which recited the claims made against Henry George Carew in the administration action), he assigned to a trustee all his interest under the will upon trust to raise a sum of 2500*l.* for the benefit of his wife and children, and subject thereto upon trust for himself. Subsequently Henry George Carew joined with his wife in further mortgaging their interests under the will.

Under these circumstances a summons was taken out by the surviving trustee of the testator's will asking that it might be declared who, according to the true construction of the will and in the events which had happened, were entitled to the moiety of the testator's estate given to Henry George Carew, subject to the life interest thereby created in favour of the testator's widow.

C. E. Bovill, for the trustees, stated the questions to the Court.

Hastings, Q.C., and *W. D. Rawlins*, for H. G. Carew. There was at the time of the death of the testator's wife no such "legal disability" on the part of Mr. H. G. Carew as to cause any forfeiture of the benefits given to him by the will. It is questionable whether an actual bonâ fide bankruptcy would have constituted a "legal disability." The expression has never yet been construed by the Court with reference to any

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question of this kind; but we submit that it must mean a condition of personal civil status, imposed or recognised by law, during the continuance of which neither the person himself nor any one claiming under him can deal with or give a receipt for property. It now includes (1) infancy, coverture, idiotcy, lunacy, and unsoundness of mind, as appears from the only three Acts of Parliament in which any definition of the word "disability" is given, namely, the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 7, and the Real Property Limitation Acts, 1833 and 1874 (3 & 4 Will. 4, c. 27, s. 16, and 37 & 38 Vict. c. 57, s. 3). Neither of these Acts includes bankruptcy in the definition of "disability," and this is probably because in the case of a bankruptcy the trustee is the statutory assign of the bankrupt and succeeds to his rights: Brown's Law Dic. ed. 1874, p. 119. But, however that may be, the bankruptcy, in order to constitute a legal disability, must be a real bankruptcy, and not a bogus bankruptcy as this was, got up for the purpose of passing over property, and annulled as soon as its real character became known: *Metcalfe* v. *Metcalfe* (2); *Lloyd* v. *Lloyd* (3); *In re Loftus-Otway.* (4) The bankruptcy, moreover, was annulled before any claim had been made or property handed over; so that even if it had been bonâ fide no forfeiture would have taken place: *White* v. *Chitty.* (5) Again, the gift over is void for repugnancy, for there cannot be an absolute gift of property accompanied by a proviso against alienation, and the restraint cannot be read as a condition: *In re Machu* (6); *In re Dugdale* (7)

They further contended that no legal disability resulted from the mortgages executed by H. G. Carew.

Henry Fellows, for Francis Dashwood, the first incumbrancer. A forfeiture clause always receives a very strict construction. As to the annulment—where the receiving order

(1) Formerly persons attainted of treason or felony were under absolute disability; but this rule was abolished in 1870, except in cases of lineal descent from outlawed persons: see the Act to abolish Forfeitures for Treason and Felony (33 & 34 Vict. c. 23).—Reporter.

(2) [1891] 3 Ch. 1.

(3) L. R. 2 Eq. 722.

(4) [1895] 2 Ch. 235.

(5) L. R. 1 Eq. 372.

(6) 21 Ch. D. 838.

(7) 38 Ch. D. 176.

ought not to have been made, the property reverts to the debtor under s. 35 of the Bankruptcy Act, 1883, and he is remitted to his original position: *Bailey* v. *Johnson.* (1)

Theodore Ribton, for a judgment creditor and receiver of H. G. Carew. "Legal disability" must have a narrower meaning than mere "disability"; and the testator obviously contemplated a disability which would affect the civil status of his son with reference to his entire property. [He cited Co. Litt. 128 a and 128 b, ss. 196, 197, *Doering* v. *Doering* (2), and the Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

Fooks, for the Legal Reversionary Society.

Grosvenor Woods, Q.C., and *Phillpotts*, for the wife and children of H. G. Carew. The rule that an absolute disposition cannot be cut down has never been held to apply to alternative gifts: *Kearsley* v. *Woodcock* (3); *Churchill* v. *Marks* (4); *In re Payne* (5); *In re Porter.* (6) The last of those cases shews that a gift for life may be followed by an alternative gift. In this case the son was not entitled to deal with the property before the life interest came to an end, and he is only to take an absolute interest in case, on the termination of the life interest, he is in a position to give a discharge. The dominant idea in the testator's mind is personal enjoyment by his legatee, and his intention is to deprive the legatee of the gift if, at the particular time when it would come to him, he is not in a position to enjoy it. While it is the general rule to assume that a testator intends the words he uses to bear their ordinary grammatical meaning, regard must be paid to the object to be deduced from his general intentions disclosed in the will. The authorities applicable to a clause of this kind are: *Lloyd* v. *Lloyd* (7); *Trappes* v. *Meredith* (8); *Ex parte Eyston* (9); *Samuel* v. *Samuel* (10); *Metcalfe* v. *Metcalfe.* (11)

"Disability" is not defined by law. In a document its meaning can only be interpreted by reference to the context, and

(1) L. R. 7 Ex. 263.
(2) 42 Ch. D. 203.
(3) 3 Hare, 185.
(4) 1 Coll. 441.
(5) 25 Beav. 556.
(6) [1892] 3 Ch. 481, 486.
(7) L. R. 2 Eq. 722.
(8) L. R. 9 Eq. 229.
(9) 7 Ch. D. 145.
(10) 12 Ch. D. 152.
(11) [1891] 3 Ch. 1.

STIRLING J. there is nothing in this will to shew that it means an alteration of civil status. A "legal disability" is a disability of which the law will take notice, but not necessarily a disability by act of law: Jacob's Law Dic. ed. Tomlins; Co. Litt. 220 b. s. 355. It includes bankruptcy because there is a cessio bonorum. It is not necessary for us to shew that the words of the will actually cover our case; it is enough to shew that there is an ambiguity; and if there is, then the testator's primary object being a personal benefit at a particular time, if the legatee cannot then take it for his own benefit, the gift over must take effect. Here there is both the ambiguity and the dominant idea to deprive the legatee of his legacy if he has alienated it. And even if there is no disability by reason of the bankruptcy which was annulled, the legatee has so dealt with and alienated the property that there is nothing coming to him through the annulment; so that the forfeiture clause comes into operation on that account. He is also a defaulting trustee with a large sum of money found due from him which has been charged upon his interest under the will; and both by himself before marriage, and after marriage together with his wife, he has mortgaged and assigned away all his interest under the will: *Samuel* v. *Samuel* (1); *Trappes* v. *Meredith* (2); *In re Brown* (3); *Barnett* v. *Sheffield* (4); *Morris* v. *Livie* (5); *Seymour* v. *Lucas* (6); *Metcalfe* v. *Metcalfe* (7); *Ford* v. *Tiley* (8); Leake on Contracts, 3rd ed. 751.

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Elgood, for a mortgagee.

Hastings, *Q.C.*, in reply.

Jan. 15. STIRLING J. (after stating the facts of the case). It was suggested that the gift in favour of the wife and children of H. G. Carew was one which took effect by defeating an absolute interest in the first instance given to him, and was consequently bad for repugnance.

I am unable to take this view of the gifts, which appear to

(1) 12 Ch. D. 152.
(2) L. R. 7 Ch. 248, 251, 252.
(3) 32 Ch. D. 597.
(4) 1 D. M. & G. 371.
(5) 1 Y. & C. Ch. 380.
(6) 1 Dr. & Sm. 177.
(7) [1891] 3 Ch. 1.
(8) 6 B. & C. 325.

me to be alternative—that is to say, I read the will as if it had been expressed thus: "In case the said H. G. Carew shall survive both my said wife and myself, and shall not at the time of the death of the survivor of my said wife and myself be under any legal disability . . . . then I give the same to him absolutely; but if he should predecease either my said wife or me, or in case of his being at the time of the death of the survivor of my said wife and me under any legal disability . . . . then I give it in favour of his wife and children." The question then arises which of the two alternatives has occurred; and the answer depends on the true meaning of the words "being . . . . under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his personal and exclusive benefit." "Of disabilities," says Lord Coke (Co. Litt. 220 b), speaking of disability on the part of a feoffee to perform a condition annexed to the feoffment, "some be by act of the party, some by act in law." The distinction has been repeatedly recognised. Thus, in cases of a character somewhat similar to the present, it has been held that a limitation for life determinable on alienation by the tenant for life is not determinable by alienation by act of the law: see *Lear* v. *Leggett* (1); *Pym* v. *Lockyer* (2); *Rochford* v. *Hackman* (3); and I apprehend that a limitation for life, which on its true construction was made determinable by act of the law, would not be determinable by a voluntary alienation. What I have to decide, therefore, appears to be whether the language of the testator, fairly construed, extends to both classes of disability, or is to be confined to disability arising by act of law. The event on which the limitation in favour of Mrs. Carew and her children arises is that of H. G. Carew "being" at a particular time "under any legal disability" involving certain consequences. Now, a man is more appropriately said to be *under* a disability when that disability is imposed "in invitum," than when it arises from a voluntary act by which he has disabled himself. Again, the words are "under any *legal* disability": some force ought to be given to the word "legal," and it seems to me to

(1) 1 Russ. & My. 690.
(2) 12 Sim. 394.
(3) 9 Hare, 475, 484.

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indicate a disability imposed by law rather than one simply arising out of a voluntary act. A person who has assigned away a particular property is no doubt thenceforth prevented from taking the same for his personal and exclusive benefit; but I do not think that he could, according to the ordinary use of language, be described as "under a legal disability in consequence whereof" he is so prevented; though he might well be described as having so disabled himself. In my judgment, therefore, the disability contemplated by the testator was not one arising simply from the voluntary act of H. G. Carew, but one imposed by act of the law.

I have then to consider whether H. G. Carew was at the death of the testator's widow under such a disability. At that time he was bankrupt; and bankruptcy certainly appears to me to be a disability imposed by law. The adjudication, however, was obtained on H. G. Carew's own application when his mother was in extremis; it was annulled within three weeks afterwards, and that on the ground that it never ought to have been made. I am unable to treat this as a valid and effectual bankruptcy. The order of April, 1895, which expressly states the ground assigned by the Court itself for the annulment, is conclusive. However, apart from this I should be of opinion that the facts shew it to be a mere contrivance on the part of the bankrupt, probably resorted to in order to procure a benefit for his wife and children. I think, therefore, that at the death of his mother H. G. Carew was not under any real disability arising out of bankruptcy.

It is further said that the large sum of 5188*l.* 16*s.* 10*d.* has been found due from the defendant H. G. Carew, and has by the order on further consideration been charged on the interest of H. G. Carew under his father's will. If an ordinary creditor of H. G. Carew had recovered judgment against him, and then obtained an order for payment out of his beneficial interest under his father's will, I should have thought that there was much force in the contention that H. G. Carew had come under a legal disability in consequence of which he would be hindered in or prevented from taking such interest for his own personal and exclusive benefit. In the present case the defendant H. G.

Carew was an executor of the will; he has received assets of the testator to the amount mentioned for which he is unable to account. Under these circumstances the Court treats him as having taken the sum which came to his hands in respect of his beneficial interest; and the true meaning and effect of the order on further consideration is simply to preclude him from receiving any further part of the trust property for his own benefit until the other cestuis que trust have received as much as himself. This view of the position of the defendant appears to me to be laid down by Lord Romilly M.R. in *Irby* v. *Irby* (No. 3) (1) and by Sir George Jessel M.R. in *Jacubs* v. *Rylance*. (2) The disability which has arisen on the part of H. G. Carew is therefore, in my opinion, one which has arisen from his own voluntary act, and is not one imposed by the act of the law.

In my judgment, therefore, the event on which the limitation arises in favour of Mrs. Carew and her children has not occurred; but unless all parties are agreed as to the priorities of the persons claiming under Henry George Carew I cannot now decide who are entitled to so much of the fund as may be coming to him.

I will accordingly make a declaration that the limitation in favour of Mrs. Carew and her children has not arisen, but that the limitation in favour of H. G. Carew has taken effect. Then, unless the parties are agreed, there must be an inquiry who are the persons entitled as claiming under him.

Solicitors: *Busk & Mellor; E. Vernor Miles; Rye & Eyre; E. H. Goddard; Mear & Fowler; Elgood & Moyle; Routh, Stacey & Castle.*

(1) 25 Beav. 632, 637, 638.

(2) L. R. 17 Eq. 341.

W. W. K.

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Jan. 25.

In re GEORGE ARMSTRONG & SONS.

Solicitor—Client alleged Lunatic—Order obtained ex parte—Pending Petition for Inquisition—Suppression by Solicitor—Costs.

The decisions in *Hartley* v. *Gilbert* (13 Sim. 596) and *Beall* v. *Smith* (L. R. 9 Ch. 85) do not amount to a holding that a solicitor, who believes his client to be sane, cannot take proceedings in the name of the client if he knows that Lunacy proceedings are pending, but only that in a proper case the Court will, when informed of such proceedings, direct a stay pending the completion of the Lunacy inquiry.

A solicitor, believing his client to be of sound mind, obtained an order for her on an ex parte application without disclosing the fact that a petition in Lunacy was pending against her. She was subsequently found to be of unsound mind. Upon an application to discharge the order:—

Held, that the solicitor had not been guilty of such professional misconduct as to make him liable for the costs.

THIS was a motion by a firm of solicitors, Messrs. George Armstrong & Sons, asking that a common order for the delivery and taxation of their bill of costs against Miss Sarah Watson, obtained on April 8, 1895, by Mr. G. B. Wilson, solicitor, on her behalf, might be discharged for irregularity, on the ground that it was obtained by the suppression by Mr. G. B. Wilson of the fact that Miss Watson was, at the date of the said order, a person of unsound mind, incompetent to manage her affairs, or to employ or instruct Mr. Wilson to apply for the said order, and that the same order was obtained without her knowledge; and further, that a petition in Lunacy for an inquiry as to the state of her mind was, at the date of the said order and to the knowledge of Mr. Wilson, pending; and for an order that Mr. Wilson might be ordered to pay the costs as between solicitor and client of and incident to the application. Miss Watson, who was entitled to certain real estate, had for some time employed Messrs. Armstrong as her solicitors. In the latter part of 1894 Messrs. Armstrong began to suspect that her mental faculties were failing, and they communicated with her nephew, Mr. Milburn. He, on March 12, 1895, took out a summons in Lunacy, asking for the appointment of a receiver and manager of her estate, and the application of the rents and

income thereof for her maintenance and benefit. The summons was, on March 15, served on Miss Watson personally; on March 16 she, with Mr. Wilson Watson, a son of her brother, called on Messrs. Armstrong with reference to the summons, which she said she opposed, and she asked them to give to her certain money of hers which they had under their control, but they refused to do so. She then went with Mr. Wilson Watson to Mr. Wilson, and gave him a retainer to oppose the summons in Lunacy, and to obtain from Messrs. Armstrong & Bell the delivery up of all documents and personal property belonging to her in their control. Mr. Wilson applied to Messrs. Armstrong for the documents, but they refused to give them up. On March 20 Miss Watson filed a notice of objection to the summons. On March 29, on the summons coming on, the master intimated that, in consequence of the nature of the objection, a petition must be presented. On April 1 Mr. Milburn presented a petition asking for an inquiry as to Miss Watson's state of mind, and on April 3 that was served on her personally. On April 8 Mr. Wilson on an ex parte application obtained the order to tax without informing the officer of the court that Miss Watson was alleged to be of unsound mind, and that a petition against her was pending. On April 23 notice of motion to discharge the order was given. On April 24 an order for an inquisition was made; and on June 11 it was found that she was of unsound mind and incapable of managing her affairs, though capable of taking care of herself. The notice of motion was then amended by making the committee a respondent, and he made no opposition to the order. The amended notice was dated December 6, 1895. The nature of Miss Watson's lunacy was that she was subject to hallucinations. It appeared from Mr. Wilson's evidence that he first became acquainted with Miss Watson on March 16, 1895, and that though she seemed eccentric she gave him clear and rational instructions, and during several conferences conversed with him without indicating that she had any hallucinations, and it was not until April 3 that he became aware that she was subject to them; and he stated that it was his opinion at the time that she was quite competent, with the assistance of

STIRLING J. Mr. Wilson Watson, to take care of herself and her affairs, and was not of such unsound mind as was alleged.

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There was practically no dispute that the order to tax must be discharged, the real question being whether Mr. Wilson ought to be made to pay the costs of the application.

Buckley, Q.C., and *H. Fellows*, for the applicants. It was within Mr. Wilson's knowledge that the petition was pending, and the proceedings which he took in Miss Watson's name constitute a fraud on the Lunacy jurisdiction: *Hartley* v. *Gilbert* (1); *Beall* v. *Smith*. (2) The order would never have been made if the fact that the petition was pending had not been suppressed by Mr. Wilson. He ought, therefore, to pay the costs of this application to discharge the order.

Hastings, Q.C., and *Gatey*, for Mr. Wilson. The real question is whether at the time Mr. Wilson received instructions from the lady he was justified in thinking that she was capable of managing her affairs. Isolated delusions do not preclude a person from entering into a contract, and this was a contract with a solicitor. It would add a serious risk to the business of a solicitor if he were to be liable to pay costs in such a case as this. The argument is that a solicitor cannot take proceedings on behalf of a client against whom proceedings in Lunacy have been instituted, even if he believes the client to be of sound mind, as Mr. Wilson did in this case.

[STIRLING J. Was he not bound to disclose the fact that a Lunacy petition was pending when he obtained the order ex parte?]

No, that was not material, because he believed his client to be sane.

Buckley, Q.C., in reply, referred to s. 98 of the Lunacy Act, 1890, and *In re Pountain*. (3)

STIRLING J. The discharge of the order to tax is a matter of course, in the absence of opposition. The only question is whether Mr. Wilson is liable for the costs. It cannot be dis-

(1) 13 Sim. 596. (2) L. R. 9 Ch. 85.

(3) 37 Ch. D. 609.

puted that the Court has jurisdiction to order him to pay them. The jurisdiction was exercised in *Beall* v. *Smith* (1); but, of course, it is a serious thing to make an order of that kind, and the jurisdiction is not one to be exercised lightly. Let us see what the facts are here. [His Lordship then stated the facts, and continued :—]

The question is whether Mr. Wilson has been guilty of professional misconduct in obtaining ex parte the order to tax without disclosing that his client was alleged to be of unsound mind, and that a petition in Lunacy was pending against her.

If on the evidence I could come to the conclusion that he knew on April 8 that she was of unsound mind, then I should say that he was guilty of misconduct, and ought not to have obtained the order; but I cannot come to that conclusion. I must take it that on April 3 he was aware that she was subject to hallucinations, but it does not follow that he was then aware that she was of unsound mind so as not to be able to manage her affairs. It is a difficult thing to ascertain a person's state of mind, and the border line between sanity and insanity is not easy to fix. No doubt the lady was insane at the time; but there is no evidence that he knew it, or that he was party to any improper conduct, if there was any, on the part of Mr. Wilson Watson, who assisted Miss Watson in instructing him. I cannot, therefore, hold Mr. Wilson guilty of misconduct in instituting legal proceedings on behalf of a client whom he believed to be of sound mind. It was said that Shadwell V.-C., in *Hartley* v. *Gilbert* (2), held that to take or continue proceedings in a suit after a petition in Lunacy had been presented against the party was in one sense a fraud upon the Lunacy jurisdiction. In that case, after the decree in the suit, a commission of Lunacy was issued against the plaintiff, a married woman suing by her next friend. The plaintiff's husband moved that all proceedings in the suit might be stayed until after the opening of the commission, and the result of the inquiries directed by the commission was known. Shadwell V.-C. said: "The only question is whether I shall allow a sort of fraud (using that word in the sense in which it is used in this Court) to be practised on the

(1) L. R. 9 Ch. 85. (2) 13 Sim. 596.

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jurisdiction in Lunacy. Primâ facie there is good ground for supposing that the suit, instead of being conducted by the next friend, will be conducted under the jurisdiction in Lunacy. Therefore, nothing ought to be done in the master's office, until the Court has been informed what has been the result of the proceedings under the commission of Lunacy." The Vice-Chancellor there does use the word "fraud"; but it does not seem to me that he meant to go the length of saying that a solicitor who believed his client to be sane could never take proceedings in the name of the client if he knew that a petition in Lunacy against the client had been presented. If that were so, it might be very disadvantageous to the alleged lunatic. All that that case goes to, in my opinion, is that the Court when informed of the petition will in a proper case stay the proceedings until the inquiry into the state of mind of the party has been completed. In the present case an application to stay the proceedings would have been a proper course to take; but I can imagine a case in which for the protection of the alleged lunatic or his property it would be proper that the proceedings in his name should be allowed to go on. Another authority referred to was *Beall* v. *Smith*. (1) In that case, after the inquisition had been held, proceedings in the name of the lunatic were prosecuted without the committee being communicated with, and the Court of Appeal held that there had been professional misconduct on the part of the solicitor. I am bound by the decision in that case. Moreover, if it be material to say so, I agree with what was laid down in it, and in no way desire to depart from it. In the present case, when the proceedings were instituted, there had been no inquisition, and the case is only relied upon because James L.J. in his judgment said (2): "There is no decision that it" (a suit) "can go on in the interval between the inquisition and the appointment, and Shadwell V.-C. expressed a clear opinion that going on even after the commencement of proceedings in Lunacy would be a fraud on the jurisdiction." The Lord Justice there adopts the language of Shadwell V.-C., who, as I have said, used the word "fraud" in a qualified sense, and meant no more than

(1) L. R. 9 Ch. 85. (2) L. R. 9 Ch. 95.

that the Court would in a proper case stay the proceedings until the result of the inquiry was ascertained. Then it was said that the solicitor was guilty of professional misconduct in not disclosing that the petition was pending when he obtained the common order to tax. I express no opinion as to whether it would not have been better that he should have disclosed it; but as I cannot come to the conclusion that the omission was anything more than a mistake, and in my opinion it was not such misconduct as to make Mr. Wilson liable for the costs. I think there is no reason for supposing that the proceedings here were taken otherwise than in good faith, and in the interest of the lady by the person advising her. I discharge the order to tax with costs to be paid out of the lunatic's estate, and dismiss the motion as against Mr. Wilson with costs to be paid by the applicants, who can apply in the Lunacy to be recouped such costs out of the estate.

Solicitors: *King, Wigg & Co., for George Armstrong & Sons, Newcastle-upon-Tyne; J. E. & H. Scott, for G. B. Wilson, Newcastle-upon-Tyne.*

G. A. S.

ATTORNEY-GENERAL *v.* TRUSTEES OF THE LONDON PAROCHIAL CHARITIES.

[1894 A. 1377.]

Burial Ground—Building upon Disused Burial Ground—Sale or Disposition "under the authority of any Act of Parliament"—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*), *ss.* 80–85, 96—*Metropolitan Open Spaces Act*, 1881 (44 *&* 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 *&* 48 *Vict. c.* 72), *ss.* 3, 5—*Open Spaces Act*, 1887 (50 *&* 51 *Vict. c.* 32), *s.* 4.

In 1885 land forming part of a disused burial ground, building upon which, except for the purpose of enlarging places of worship, is prohibited by s. 3 of the Disused Burial Grounds Act, 1884, was acquired by the Commissioners of Sewers for the City of London under the powers of 57 Geo. 3, c. xxix., for the purpose of street improvements. A portion of the land so acquired was afterwards resold by the commissioners as surplus land to the defendants, a body of charity trustees, who, with the consent of the Charity Commissioners, let it for general building purposes.

In an action for an injunction to restrain the defendants from building upon the land:—

Held, that it had been "sold under the authority of an Act of Parliament"

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within s. 5 of the Act of 1884, and consequently was excepted from the operation of that Act.

Sect. 5 applies to a sale or disposition made after the commencement of the Act.

In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract ([1895] 1 Ch. 702) preferred upon this point to *In re Trustees of St. Saviour's Rectory and Oyler* (31 Ch. D. 412).

THIS was an action by the Attorney-General at the relation of the vicar and churchwardens of the parish church of St. Botolph Without, Aldersgate, in the City of London, and by the vicar and churchwardens as plaintiffs, asking for an injunction to restrain the defendants from building on a piece of land lying between the street called Little Britain and the churchyard of St. Botolph's, on the ground that it was part of a disused burial ground, and that building upon it would be an infringement of the Disused Burial Grounds Act, 1884, and the Metropolitan Open Spaces Acts, 1881 and 1887.

The land in question, together with other land now forming part of Little Britain, was in 1885 acquired by the Commissioners of Sewers for the City of London under the powers of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.) for the purpose of widening Little Britain, and was purchased, as to part, from the Ecclesiastical Commissioners, whose title was derived from the Dean and Chapter of Westminster, and as to other part from certain charity trustees who held it upon trust to permit the churchwardens of the parish of St. Botolph to administer the same as the parishioners in vestry assembled should from time to time direct. At the time of the purchase by the commissioners the greater part of the land was covered by old houses, the remainder forming a passage-way which was bounded by a wall dividing it from the churchyard. The commissioners had pulled down all these houses, and thrown a portion of their sites into Little Britain; and in 1887 they, under the powers of the same Act (57 Geo. 3, c. xxix.) resold to the above-mentioned charity trustees as surplus land so much of the land as they did not require. This was the land as to which the present dispute had arisen. For some time it was used as a public garden in connection with the adjoining churchyard. In 1891 the estates of the parish trustees became vested

in the defendants, and they had, with the consent of the Charity Commissioners, agreed to let the land in question for ordinary building purposes. When the building lessees were making their excavations they discovered a quantity of human remains, and upon that becoming known these proceedings were taken. The contention of the plaintiffs was that the land was formerly part of the churchyard, and had been "set apart for the purposes of interment."

A "disused burial ground" under the combined definitions contained in s. 1 of the Metropolitan Open Spaces Act, 1881, s. 2 of the Disused Burial Grounds Act, 1884, and s. 4 of the Open Spaces Act, 1887, means any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council. Sect. 3 of the Disused Burial Grounds Act of 1884 provides that after the passing of the Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging places of worship. Sect. 5 provides that nothing in the Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament.

The Act 57 Geo. 3, c. xxix., was an Act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein. It empowered (s. 80) certain public bodies, amongst whom were the Commissioners of Sewers, for the improvement of the streets and public places within their districts, to alter, widen, turn, or extend such streets or public places; and if any houses, walls, buildings, lands, tenements, or hereditaments, or any part thereof, should be adjudged by the commissioners to obstruct or prevent them from so altering, turning, widening, or extending the said streets or public places, and the possession or occupation of them would be necessary for that purpose, the commissioners were empowered to treat, contract, and agree with the several owners or occupiers of such houses, walls, buildings, lands, and hereditaments of whatsoever nature, tenure,

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kind, or quality for the purpose of the improvement, and to pay for the same such sum of money as might be agreed upon. Sect. 81 empowered certain corporate bodies and incapacitated persons, including particularly "trustees and feoffees in trust for charities or other purposes," to treat and agree with the public body for the absolute sale of the property, and to sell and convey the same accordingly. Sect. 82 provided for the assessment by a jury of disputed compensation; and ss. 84 and 85 contained provisions as to the mode of payment of the purchase-money on sales by corporations and incapacitated persons. Sect. 96 empowered the public body to resell the estates and hereditaments purchased by them, provided that such estates and hereditaments were first offered for sale to the persons from whom they were respectively bought.

Upon the hearing of the action two questions arose: (1.) whether the land or any portion of it had in fact been at any time "set apart for the purposes of interment" within s. 1 of the Metropolitan Open Spaces Act, 1881; and (2.) if so, whether it fell within the exception contained in s. 5 of the Act of 1884, as having been "sold or disposed of under the authority of any Act of Parliament." The first question turned entirely upon the documentary and other evidence adduced as to the title and nature of the land in dispute, and consequently does not call for a report.

Hastings, Q.C., and *P. S. Stokes*, for the plaintiffs. Upon the evidence it is clear that the passage-way, at any rate, has been "set apart for the purposes of interment," and therefore comes within the definition of a disused burial-ground, building upon which is prohibited by the Disused Burial Grounds Act, 1884, s. 3. It is suggested, however, that the land comes within the exception contained in s. 5 of the Act on the ground that it has been "sold or disposed of under the authority of an Act of Parliament." But, in order to bring it within that exception, the sale must have taken place before August 14, 1884, the commencement of the Act: *In re Trustees of St. Saviour's Rectory and Oyler.* (1) It is true that North J., in

(1) 31 Ch. D. 412.

In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract (1), expressed a contrary opinion; but we submit that the view taken in the earlier case is the correct one. The exception contemplated by the section is either a sale or disposition of specific land expressly authorized by an Act of Parliament, or a sale or disposition of land under a general power to sell or dispose of a disused burial ground. There has been no such sale here. A mere dealing with land under the powers of a general Act is not sufficient to bring it within the exception.

Sir W. Phillimore, Bart., *Buckley, Q.C.*, and *R. Neville*, for the defendants. This land comes within the saving clause, as having been sold under the authority of an Act of Parliament. The sale by the Ecclesiastical Commissioners and the charity trustees to the Commissioners of Sewers was under the express powers of the New Parishes Act, 1843 (6 & 7 Vict. c. 37), ss. 6 and 8, and Michael Angelo Taylor's Act. The Commissioners of Sewers derived their power to buy from the last-mentioned Act, and under that Act and the later sewers Acts (11 & 12 Vict. c. clxiii. and 14 & 15 Vict. c. xci.) they were enabled to resell so much of the land as they did not require for the purposes of widening the street; so that the sale in 1885 certainly took place "under the authority of an Act of Parliament." The fact that it was after the commencement of the Act of 1884 does not prevent the application of s. 5: *In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract.* (1)

[STIRLING J. If s. 5 of the Act of 1884 is to be read literally, a sale under the Settled Land Acts would seem to come within it.]

No; because land sold under those Acts is land which would vest absolutely in some one at some time or other, and the power of disposition is only accelerated by the Acts, which empower persons having only limited interests to sell under a kind of statutory power of attorney as if they were unlimited owners. The Acts contemplated by the section are Acts enabling particular lands to be sold which could not otherwise

(1) [1895] 1 Ch. 702.

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be so dealt with. In the case of the Settled Land Acts, the disability is in the vendor; in the case of Acts contemplated by the section the disability is in the land itself. That is the distinction. Here the land has been both sold and disposed of under the authority of an Act of Parliament.

R. J. Parker, for the lessees under the building agreement.

Hastings, Q.C., in reply.

Jan. 29. STIRLING J., after stating the facts, came to the conclusion upon the evidence that as to the greater portion of the land in question, namely, that which comprised the sites of the houses, it had not been proved that it had ever been set apart for the purposes of interment; as to the remaining portion, however, consisting of the passage-way, he thought that a primâ facie case had been made out that it had at one time been set apart for such purposes. He then continued:—

It was, however, contended on the part of the defendants that even then no order ought to be made, because the case fell within the exception from the operation of the Act of 1884 contained in s. 5, which enacts that "nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament." The language of that section, notwithstanding its apparent simplicity, presents difficulties of interpretation when applied to the facts of the present case. It was said on behalf of the plaintiffs (1.) that this section did not apply to a sale subsequent to August 14, 1884, the date of the passing of the Act; and (2.) that the site of the passage-way had not been sold or disposed of under the authority of any Act of Parliament within the meaning of the section. The first of these points has already been considered in two cases, namely, *In re Trustees of St. Saviour's Rectory and Oyler* (1), before Bacon V.-C., and *In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract* (2), before North J. Those two learned judges appear to have arrived at different conclusions, and, having carefully considered their judgments, I think that the construction placed on the enactment by North J. is, for the reasons

(1) 31 Ch. D. 412. (2) [1895] 1 Ch. 702.

given by him in his judgment (1), to be preferred, and I therefore hold that s. 5 may apply to the sale to the Commissioners of Sewers of the City of London, notwithstanding that that sale did not take place until 1885. The second question appears to arise for the first time. The sale in 1885 was made under the provisions of ss. 80 and 81 of the Act 57 Geo. 3, c. xxix., commonly known as Michael Angelo Taylor's Act. The effect of these provisions has been repeatedly considered by the Courts, particularly in *Thomas* v. *Daw* (2) and *Gard* v. *Commissioners of Sewers of City of London*. (3) The effect of them may be thus stated. Certain public bodies within the limits of the bills of mortality and the parishes of St. Pancras and St. Marylebone (among which bodies are included the Commissioners of Sewers of the City of London), are thereby empowered, for the purpose of improving the streets within their jurisdiction, to adjudge that "any houses, walls, buildings, lands, tenements, and hereditaments" (words of the widest import and amply sufficient to include a burial ground, whether used or disused), "or any part thereof," prevent them executing a proposed improvement. Such an adjudication has been held to be a necessary preliminary to the taking of any further steps: see *Thomas* v. *Daw*. (2) The adjudication being made (of course good faith is requisite, but as to this no question has been raised), the bodies in question have power (s. 80) "to treat, contract, and agree with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments of whatsoever nature, tenure, kind, or quality" for the purpose of the improvements, and to pay for the same such price as may be agreed upon; and (s. 81) all persons, including particularly "trustees and feoffees in trust for charities," are empowered to treat and agree with the public body for the absolute sale of the property, and sell and convey it accordingly. Sect. 82 confers compulsory powers for the acquisition of such lands; and s. 84 requires the purchase-money in the case of sales by incapacitated persons to be paid into this court, and dealt with according to its orders. It appears from the documents

(1) [1895] 1 Ch. 712–13. (2) L. R. 2 Ch. 1.
(3) 28 Ch. D. 486.

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in evidence that this course was strictly pursued: there was an adjudication by the Commissioners of Sewers, a treaty or negotiation between them and the charity trustees, resulting in the ascertainment of the price by an arbitrator, payment of the purchase-money into court, and a conveyance. The commissioners derived their power to purchase, and the charity trustees their power to sell, from the statute. Each step was taken under and in accordance with the authority conferred by the statute, and from that authority alone the sale derived its validity. I can come to no other conclusion than that the passage-way (which was included in the lands taken by the commissioners) was sold under the authority of an Act of Parliament, namely, 57 Geo. 3, c. xxix. Why, then, does not the case fall within s. 5 of the Act of 1884? It was said that some limitation must be put on the words of the enactment, otherwise a sale by a tenant for life under the powers conferred by the Settled Land Acts would fall within it, with the result that a disused burial ground, if sold by a tenant for life, might be built upon, while if sold by an absolute owner it could not. I should be very slow to arrive at any such conclusion, and if to escape from it some limitation must be put upon the language of the Act, that will have to be considered when the case arises. It is enough on the present occasion to say that, whatever limitation is to be imposed, it ought not, in my opinion, to exclude from the operation of s. 5 a sale effected under such circumstances as that of 1885 in this case. The result is that the action must be dismissed.

Solicitors: *M. Webb & Sons; Robert Pearce; Clarke & Blundell.*

G. A. S.

KEKEWICH J.

1896

Jan. 16.

In re MONTAGU. FABER *v.* MONTAGU.

[1895 M. 2902.]

Trustee—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 31, 32, 50—*Infant tenant in tail in possession—Form and effect of Vesting Order.*

Where under the Trustee Act, 1893, an order is made vesting, or appointing a person to convey, the estate of an infant tenant in tail in possession, the effect is to bar the estate tail and remainders over.

Powell v. *Matthews* (1 Jur. (N.S.) 973) followed.

The order in such a case should not (as in Seton on Judgments, 5th ed. vol. ii. p. 1067, Form No. 21) contain a reference to the mode of conveyance under the Fines and Recoveries Act, but should simply vest the land for such estate as the infant, if of full age, could convey.

Under an indenture of resettlement dated August 26, 1843, Frederick James Osbaldeston Montagu became entitled as tenant in tail in remainder expectant on the decease of his uncle Andrew Montagu without issue to hereditaments in the county of York known as "the Melton estate." The indenture contained limitations over to uses in favour of the brother and sisters of Frederick J. O. Montagu, and under which other persons as yet unborn might possibly become entitled.

Andrew Montagu by his will, dated September 16, 1895, after making a specific devise, devised real estate in the county of York to which he was absolutely entitled (in the will referred to as the "secondly devised premises") to the use of trustees, during so long as Frederick J. O. Montagu should be living and should be under the age of twenty-five years, to the intent that they should exercise powers of management as therein mentioned, with remainder to the use of Frederick J. O. Montagu during his life without impeachment of waste, with remainder to certain uses in favour of the sons and daughters of Frederick J. O. Montagu in tail male and in tail, with remainder to uses and upon trusts in favour of the brother and sisters of Frederick J. O. Montagu and other persons; and the testator proceeded to devise "the Melton estate," of which he described himself as then being tenant for life under the

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indenture of August 26, 1843, to the uses, upon the trusts, and subject to the powers therein declared concerning his Yorkshire estate, and the testator declared that the devise lastly hereinbefore contained should take effect under the doctrine of election, and should thereby bind Frederick J. O. Montagu, and every person who should become tenant in tail male or in tail in possession of the Melton estate under the said indenture, and that Frederick J. O. Montagu and every such other person should accordingly, at the request and to the satisfaction of the trustees, execute, enrol, perfect, and do all assurances necessary for evidencing such election, and giving effect to that devise; and the testator declared that if Frederick J. O. Montagu or such other person should refuse or neglect to comply with such request, or fail to execute such assurances, the testator's will should be construed and the rights of all persons claiming thereunder be determined as if the person so refusing, neglecting, or failing had died immediately before the testator without having been married.

Andrew Montagu died on October 8, 1895, a bachelor, and accordingly, on his death Frederick J. O. Montagu became tenant in tail male in possession of the Melton estate.

Frederick J. O. Montagu and his brother and sisters were respectively infants—Frederick, who was born on February 9, 1878, being now seventeen years of age.

Upon an application in the matter of the infants his Lordship, on December 13, 1895, made an order appointing C. H. Morton guardian of the estate of Frederick J. O. Montagu, for the purpose of receiving and applying any sums paid to him for the benefit of the said infant, and, "the judge being of opinion that it will be for the benefit of the infant Frederick J. O. Montagu to elect to take according to the provisions of the will of the said Andrew Montagu," directions were given for the allowance and payment of certain sums by way of maintenance and otherwise for the benefit of the infants.

This action (the writ in which was issued on December 16, 1895) was brought by the trustees of the will, as plaintiffs, against Frederick J. O. Montagu and his brother and sisters as defendants, claiming that it might be determined and declared

whether the infant defendants were bound or ought forthwith to elect to take in accordance with the provisions of the will of Andrew Montagu, and that if the Court should hold that any of the said defendants were bound so to elect, such election might be declared on their or his behalf, and directions given for complying with the provisions of the will, and vesting the Melton estate in accordance therewith.

The action now came on for trial.

Renshaw, *Q.C.*, and *Brabant*, for the plaintiffs. The only question in this case is as to the proper form of order to be made for the purpose of vesting the Melton estate in the plaintiffs, as trustees of the will. It is submitted that it is not necessary to have an order vesting the estates of all the infants in esse and all unborn persons, but it is sufficient that there should be an order vesting, or rather appointing a person to convey, the estate of Frederick J. O. Montagu, the infant tenant in tail in possession: see *Powell* v. *Matthews* (1), where, there being a tenancy for life with remainder to an infant in tail, it was held that a vesting order as to the estate of the infant with the consent of the tenant for life would bar the entail and remainders over. From the report of that case it does not clearly appear how the question there arose.

[KEKEWICH J. Probably it was an administration suit, in which the Court had decreed a sale and ordered all necessary parties to convey. In *Bankes* v. *Small* (2) the Court of Appeal, affirming my decision (3), held that the jurisdiction of the Court to decree specific performance against a tenant in tail by ordering him to execute a disentailing assurance has not been affected by s. 47 of the Fines and Recoveries Act, 1833.]

In *Hargreaves* v. *Wright* (4) an estate was vested in a tenant for life, with remainder to an infant tenant in tail, and the Court, in an action for specific performance by purchasers under an overriding contract, gave judgment directing, under ss. 16 and 20 of the Trustee Act, 1850, a conveyance to be made on the part of the infant tenant in tail. Under s. 31 of the

(1) 1 Jur. (N.S.) 973.
(2) 36 Ch. D. 716.
(3) 34 Ch. D. 415.
(4) 1 W. R. 408.

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Trustee Act, 1893, where any judgment is given for specific performance, or for the conveyance of any land either in cases arising out of the doctrine of election, or otherwise, the Court is empowered to declare that any of the parties to the action are trustees within the meaning of the Act, and to make a vesting order accordingly, or, under s. 33, an order appointing a person to convey, if that is more convenient. Then, as to the effect of the order when made, it is provided by s. 32 that it is to have the same effect as if the trustee were a person of full capacity, and had executed a conveyance or release to the effect intended by the order. The form of order in Seton on Judgments, 5th ed. vol. ii. p. 1067, No. 21, contains a reference to the effect of a conveyance executed and enrolled under the Fines and Recoveries Act; but in *Mason* v. *Mason* (1) it was held in Lunacy by James L.J. that such a reference is unnecessary, and that the order should simply vest the land for such estate as the lunatic trustee, if sane, could convey. The principle of that decision seems to be applicable, and the decision is in conformity with the definition contained in s. 50 of the Act of 1893 (as formerly in s. 2 of the Trustee Act, 1850), whereby the expressions "convey" and "conveyance" include acts to be performed by tenants in tail in accordance with the provisions of the Fines and Recoveries Act.

The Court, by the order of December 13, 1895, has already elected on behalf of the infant Frederick J. O. Montagu by declaring that it is for his benefit to elect to take according to the provisions of the will. A declaration of that kind is the regular form in which the Court elects on behalf of an infant: see Seton, vol. ii. p. 1339, Form No. 3, taken from order in *Lamb* v. *Lamb* (2); and see *Blunt* v. *Lack*. (3)

[KEKEWICH J. assented to this view.]

It appearing, therefore, that Frederick J. O. Montagu is tenant in tail in possession and is an infant, and that the Court by the order of December 13, 1895, has elected on his behalf that he should take under the will, we ask the Court to declare him to be a trustee, and to appoint the guardian C. H. Morton to

(1) 7 Ch. D. 707. (2) 5 W. R. 772.
(3) 26 L. J. (Ch.) 148, 152; 3 Jur. (N.S.) 195.

convey the Melton estate to the plaintiffs for such estate as Frederick J. O. Montagu if of full age could convey, to the uses and upon the trusts declared by the will in respect to the testator's Yorkshire estates.

P. O. Lawrence, and *F. A. Morton*, for the defendants.

KEKEWICH J. When once it is found, as in *Bankes* v. *Small* (1), that the Court can enforce the execution of a disentailing assurance, it is, I think, competent to the Court to do so as against an infant, and to declare him a trustee. The judgment now to be given may be framed in the manner suggested, but the preparation of it will require some care.

The material parts of the judgment were as follows :—

Declare that it is for the benefit of the infant defendant Frederick James Osbaldeston Montagu to take in accordance with the will of the above-named Andrew Montagu, and Declare that the manors lands and hereditaments in the county of York now subject to the uses of the indenture of resettlement dated the 26th day of August 1843 in the statement of claim in this action mentioned, and which manors lands and hereditaments are hereinafter referred to as "the Melton estate," ought in pursuance of the provision in that behalf in the said will of the said Andrew Montagu to be conveyed to the uses upon the trusts and subject to the powers and provisions in such will contained concerning the manors and hereditaments thereby devised which are therein referred to as "the secondly devised premises," and that the said manors lands and hereditaments be conveyed accordingly, And it appearing that the said defendant Frederick J. O. Montagu is tenant in tail male in possession under the said indenture of resettlement of the said Melton estate and that he is an infant Declare that the said defendant F. J. O. Montagu is a trustee of the Melton estate within the meaning of the Trustee Act, 1893, and let Charles Henry Morton &c. be appointed to convey the said Melton estate for all such estate as the infant defendant F. J. O. Montagu could, if of full age, convey unto the plaintiffs as the general trustees of the will of the said A. Montagu and their heirs discharged from the estate in tail male of the said defendant F. J. O. Montagu under the said indenture of resettlement and from all estates rights interests and powers to take effect after the determination or in defeasance of such estate in tail male To the uses upon the trusts and subject to the powers and provisions in the said will declared contained or referred to concerning the said secondly devised premises, And let the said C. H. Morton convey the same accordingly, such conveyance to be settled by the judge.

Solicitors for plaintiffs: *Avison & Co., Liverpool, for Greenfield & Cracknall, London.*

Solicitors for defendants: *Avison & Co., Liverpool.*

(1) 34 Ch. D. 415; 36 Ch. D. 716.

ROMER J.

1896

Feb. 15, 17.

WASSELL *v.* LEGGATT.

[1895 W. 1285.]

Husband and Wife—Legacy for Separate Use—Seizure by Husband—Statute of Limitations—Trustee Act, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8—*Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12.

A woman who was married in 1854 received in 1876 a legacy of 300*l.* given for her separate use, but was forcibly deprived of the money by her husband, who knew that it was a legacy. During the husband's lifetime the wife frequently asked him for the money; but no proceedings to recover it were taken until after his death, which occurred in 1894:—

Held, that the husband was affected with notice of the separate use, and was a trustee of the money for his wife; that the Statute of Limitations was no defence to proceedings by her against his executors; and that the wife was entitled to be paid the amount of the legacy, with interest at 4 per cent. from the date of her husband's death.

THE plaintiff, Susannah Wassell, was married to C. F. Wassell on January 19, 1854, and no settlement was made on or after the marriage.

Her aunt, Sarah Willats, who died on November 29, 1875, bequeathed to the plaintiff 300*l.* for her separate use, free from the debts, control, or engagements of C. F. Wassell; and on November 21, 1876, one of the executors of the will paid to the plaintiff alone, on her separate receipt, in bank notes and coin, the sum of 291*l.*, which was the amount of the legacy less the duty payable thereon.

The plaintiff took the money to her home, where she and her husband resided together, went to her bedroom, and was about to put the money away in her wardrobe, when her husband came in from a dressing-room which communicated with the bedroom, and said, "You have been for that money, and I will take it; it is mine." The plaintiff said, "It is not yours," and was walking with the money in her hand, when her husband seized her, forcibly took it from her, and left the room.

The husband never returned the money, though frequently asked to do so from this time till shortly before his death; but he told the plaintiff she should never have it. Frequent quarrels

occurred between them as to money matters, including the annexation and retention of the 291*l.*; but the plaintiff never commenced proceedings to recover the money in her husband's lifetime. According to the plaintiff's evidence, he had possessed himself of other moneys bequeathed to the plaintiff before the Married Women's Property Act, 1882, but these moneys were not given to her for her separate use.

The plaintiff had a small income of her own in addition to an annual allowance voluntarily made to her by her husband.

The husband died on December 12, 1894, having by his will, dated November 17, 1894, bequeathed the plaintiff an annuity for her life of 350*l.* per annum, and some furniture.

The defendants were the executors of the husband's will, which was proved by them on January 28, 1895.

On May 4, 1895, the plaintiff commenced this action, claiming (*a*) a declaration that C. F. Wassell was a trustee for her of the 291*l.*, and that she was entitled to rank as a creditor against his estate for the 291*l.* and interest; (*b*) payment; and (*c*) administration if assets should not be admitted.

By their statement of defence the defendants declined to admit that Wassell had received the money, but said that if he did so it was not as a trustee for the plaintiff; and alternatively, that if he received the 291*l.* the money was not retained by the plaintiff at the time of his death, or by the defendants at the commencement of the action; and that the sums paid to the plaintiff were in repayment and satisfaction of the 291*l.* The defendants also said alternatively that the notes and coin were a voluntary gift, and, also alternatively, that her claim was barred by the Statute of Limitations and s. 8 of the Trustee Act, 1888.

Oswald, Q.C., and *Stallard*, for the plaintiff. The husband by taking the property constituted himself a trustee for the wife, in the absence of clear evidence of a gift: *Rich* v. *Cockell.* (1)

Even where the wife has voluntarily given possession of the property to the husband, slight evidence will suffice to shew

(1) 9 Ves. 369.

ROMER J. 1896 WASSELL v. LEGGATT.

there was no intention to make a gift: *Green* v. *Carlill.* (1) The onus of proving a gift lies on the husband or those claiming under him: *In re Flamank.* (2) And a subsequent legacy by the husband to the wife is not a satisfaction of the wife's claim against his estate: *Rowe* v. *Rowe.* (3)

The evidence of the wife is corroborated on material points by that of other persons.

Robson, Q.C., and *Sims Williams*, for the defendants. There is nothing to constitute a trusteeship. Assuming the money was forcibly taken from the plaintiff, this was done under the impression that it was the husband's own money, for there is nothing to shew that he knew of the separate use. He could not be a trustee when he acquired without knowledge of the existence of what was necessary to the creation of a trust.

Whether the plaintiff could then sue him or not, she cannot now sustain her claim. Whether she had a right to bring a suit in equity or not prior to January 1, 1883, she had on that day, when the Married Women's Property Act, 1882, came into operation, the right to sue her husband in a common law action in respect of the separate property as if it had belonged to her as a feme sole: Married Women's Property Act, 1882, ss. 25, 12. But if her right of action commenced even so late as 1883, it is barred by the Statute of Limitations.

This is certainly the case if there is no trusteeship; and if the husband was a trustee, s. 8 of the Trustee Act, 1888, extends the Statute of Limitations to the case: *Thorne* v. *Heard.* (4)

There was never an acknowledgment by the husband sufficient to take the case out of the Statute of Limitations: *A'Court* v. *Cross.* (5)

[ROMER J. If once you are a trustee, you are hit. You were not a trustee by intent, but by inference of law, for primâ facie a man is a trustee who takes his wife's separate property.]

Not unless he knew it was separate property. If a stranger takes money not knowing that is trust money, there is a right

(1) 4 Ch. D. 882.
(2) 40 Ch. D. 461.
(3) 2 De G. & Sm. 294.
(4) [1895] A. C. 495.
(5) 3 Bing. 329.

of action against him; but he does not himself become a trustee.

Apart from the Statute of Limitations, the plaintiff's equitable right is barred by laches and acquiescence.

Oswald, Q.C., in reply. Before the Act of 1882, when money was left to a woman for her separate use, her husband became a trustee for her ipso facto: Lewin on Trusts, 9th ed. 949.

The cases cited by me shew that this is so even where the husband obtains physical possession of the property with his wife's consent, and he cannot be in a better position because he uses violence. Here the husband knew the money was a legacy, and, therefore, that it must have been given by a will. If he knew there was a will, he had notice of the contents of the will, or at any rate was put upon inquiry; and in such a case the Statute of Limitations cannot be relied upon: *Hartford* v. *Power*. (1) The Act of 1882 was passed for the protection of married women, and not to cut down their rights of action against their husbands. [He also referred to *Re Curtis* (2); *Re Blake*. (3)]

ROMER J. Although the plaintiff has shewn that her memory is not on all points to be relied on, she has established the material facts of her case, in respect of which her evidence has in many respects been corroborated.

In 1876 a legacy of a sum of money was left to her for her separate use. The money, less a deduction in respect of duty, amounted to 291*l*., and this sum was paid to her by the executor of the will on her separate receipt. She took it home, and while she was there her husband came in. She had told him of the legacy earlier in the day. He forcibly took the money away from her. From that time to the date of her husband's death a considerable time elapsed during which they lived together as husband and wife. But the evidence shews that they frequently quarrelled as to money matters, and especially with reference to the one I have referred to. It is clear that the lady never gave up her right to the money, and

(1) I. R. 2 Eq. 204, 216. (2) 52 L. T. (N.S.) 244.
(3) 60 L. T. (N.S.) 663.

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that her husband quite as strongly claimed to be entitled to retain it.

In the first place, I think that the husband, when he took the money, knew it belonged to his wife for her separate use. He knew of the existence of the will by which it was bequeathed, though I cannot say that he had actually seen the will. He knew, however, that there was a legacy, that the money had been paid to his wife on her separate receipt, and that she claimed the money as her own, and under these circumstances I think he must be taken to have known that it had been left to her for her separate use. At any rate, having regard to what he certainly did know, he was put upon inquiry. If he intended to rely on his marital right, he was put upon inquiry as to the circumstances under which his wife took the legacy, and not making such inquiry he must be taken to have acquired the money with notice of the separate use attaching to it.

The plaintiff took the legacy before the coming into operation of the Married Women's Property Act, 1882, and the husband, when he got hold of the money, became a trustee of it for his wife. That he became a trustee is clear upon consideration of what her remedies were. She was entitled to recover the money: but how could she then do so? She had no right to the money at common law. In equity he could be sued, but that must have been because he was a trustee for her, and she was beneficially entitled; for I do not know how her right in equity could have been described except as one arising from the position of trustee on his part and cestui que trust on hers. This being the position in equity, no Statute of Limitations ran against the wife. He was her trustee at first, and never ceased to be her trustee. No statute applies to the case, for the husband's executors cannot on his behalf avail themselves of s. 8 of the Trustee Act, 1888, inasmuch as he retained the money and never accounted for or parted with the possession of it. The Statute of Limitations, therefore, cannot be relied on as a defence.

Then it was contended that there had been acquiescence on the part of the wife sufficient to deprive her of the right to sue for the money. But did she in fact ever give up her claim?

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Quarrels took place down to just before the date of the husband's death. He appears to have thought he was entitled to keep the money; but he was not the less a trustee because he had strange notions as to the rights of a husband. He knew of her claim, and she never misled him as to it. She never acquiesced in his retention of the money, or lost her right to hold him or his estate liable for it.

I must, therefore, hold that the plaintiff is a creditor on her husband's estate for the amount; and as the defendants admit assets sufficient to satisfy the debt, I must order them to pay the amount with interest at 4*l.* per cent. from the date of her husband's death, and also the taxed costs of the action.

Solicitors for plaintiff: *Wellborne & Son.*
Solicitor for defendants: *Robert Carter.*

F. E.

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March 2, 9.

In re SEVERN AND WYE AND SEVERN BRIDGE RAILWAY COMPANY.

[00294 of 1894.]

Company—Shareholder—Unclaimed Dividends—Statutes of Limitation.

When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law, and the Statute of Limitations immediately begins to run. The declaration does not make the company a trustee of the dividend for the shareholder, and an entry of the liability in the company's books—at any rate when no special part of its assets is set aside as representing the dividend and no notice of the entry is given to the shareholder—does not take the case out of the statute.

Quære, whether, in the case of a company under the Companies Acts, 1862 to 1890, the period of limitation is six or twenty years.

THE Severn and Wye Railway and Canal Company, below called "the original company," was incorporated by an Act of Parliament passed in 1809.

William Robbins was, prior to the year 1812, the registered proprietor of ten ordinary shares of 50*l.* each in the original company, and John Sherborne was in 1810 the registered proprietor of ten other ordinary shares therein.

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In its early days the original company was prosperous, and paid considerable dividends. The dividends were declared half-yearly, and made payable on production to the company's bankers of a notice or dividend-warrant issued by the secretary to the shareholders, and on the applicant signing a special form of receipt.

The dividends on Robbins' shares from October, 1832, to November, 1873, amounting to 753*l.* 14*s.* 3*d.*, were never paid or claimed. After November, 1873, no dividends became payable on his shares. Sherborne died some time prior to August, 1834, when probate of his will was granted to John Cheese, his executor, and the dividends on his shares were paid to him or his executor from 1810 to April, 1855. In November, 1873, dividends ceased to be payable on these shares, but up to that time the unpaid dividends on these shares amounted to 349*l.* 4*s.* 3*d.* After April, 1855, the dividend notices or warrants were regularly issued to Cheese, but were sometimes returned through the dead-letter office, and the dividends were never claimed. Cheese afterwards died and William Lee became the legal personal representative of Sherborne.

In 1879, the original company and the Severn Bridge Railway Company were, by the combined effect of the Act 42 & 43 Vict. c. clxiii. and a certificate of the Board of Trade, amalgamated, and the two companies were united into one company and incorporated under the name of the Severn and Wye and Severn Bridge Railway Company, below called "The New Company."

In pursuance of this Act the capital of each of the amalgamated companies was kept distinct until the scheme mentioned below was sanctioned.

In 1885, the High Court of Justice sanctioned a scheme under the Railway Companies Act, 1867, under which the share capital of the new company was converted into preference and ordinary stock, the ordinary stock being allotted between the shareholders of the two amalgamated companies.

By the Great Western and Midland Railway Companies (Severn and Wye and Severn Bridge Railway) Act, 1894 (57 & 58 Vict. c. clxxxix.), it was enacted (s. 4) that the affairs

of the new company should be wound up in the same manner as if it had been a company registered under the Companies Acts, 1862 to 1890, and had on the day of the passing of the Act passed a special resolution for winding up voluntarily; and (s. 5) that the Great Western and Midland Companies should pay into the Bank of England certain moneys as the consideration for the transfer of the undertaking of the new company, which (by s. 10) was vested in the two purchasing companies jointly. The Act also provided (s. 6) that (inter alia) all moneys in the hands of the new company up to a certain date should, notwithstanding the transfer and vesting by the Act authorized, remain the property of the new company, and that the liquidators should collect these moneys and hold and apply the same as part of the assets of the new company subject to the provisions of the Act; and (s. 7) that the purchase-money aforesaid and the other assets of the new company should be applied by the liquidators in payment of certain debenture stock, and in payment and discharge of "all debts and liabilities" of the new company, and that subject as aforesaid the liquidators should distribute the same among the preference and ordinary stockholders of the new company in the proportions specified.

Prior to the amalgamation the dividends appeared in a dividend ledger of the original company, and this practice was continued in the same book after the amalgamation and down to June 30, 1885, each shareholder having an account in the ledger. In December, 1885, these were written off the dividend ledger and transferred to the general ledger to an account headed "Unpaid dividends," the whole being aggregated, and that account had ever since remained in the general ledger. In the half-yearly published accounts down to June, 1885, these dividends were entered under one item of "unpaid dividends and interest," but in subsequent half-yearly published accounts they were included in an item called "sundry outstanding accounts." The company had in some cases paid dividends which had been unclaimed for over six years.

After providing for the payments mentioned in s. 7 of the Act of 1894 the liquidators anticipated that they would have a

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surplus of about 2000*l.* in their hands, including 1238*l.* representing unclaimed dividends declared by the original company and accrued before March, 1878.

The liquidators took out an originating summons under s. 138 of the Companies Act, 1862, for the determination of the question whether the sums of 753*l.* 14*s.* 3*d.* and 349*l.* 4*s.* 3*d.*, the unclaimed dividends on the stocks held by Robbins and Sherborne respectively, should be paid to their legal personal representatives, or whether these sums should be treated as part of the general assets of the new company available for distribution among its preference and ordinary stockholders.

The respondents to the summons were (*a*) Josephine Robbins and E. B. Haygarth, the persons entitled to take out representation to the estate of W. Robbins; (*b*) William Lee, the legal personal representative of Sherborne, and (*c*) the Sharpness New Docks and Gloucester and Birmingham Navigation Company, who held and were representative of the other holders of preference and ordinary stock in the new company.

The summons was heard before Romer J. on March 2, 1896.

Frederic Thompson, for the liquidators, stated the facts to the Court, and said that the liquidators wished to raise the question whether the claims of the representatives of Robbins and Sherborne were barred by the Statute of Limitations.

Vernon Smith, Q.C., and *Rowden*, for the Sharpness Company. The Sharpness Company represents the preference and ordinary stockholders who are entitled to the fund the title to which is in dispute in case the Statute of Limitations is an answer to the claim of the other respondents.

The dividends were declared, and notice of the declaration was given to the shareholders more than twenty years ago, and the claims of the shareholders are statute-barred. This is not a case of partnership.

"Dividends which are actually declared and payable by an incorporated company, are recoverable by action brought by the person having the legal title to receive them, against the company": Lindley on Companies, 5th ed. p. 437. The shareholders' right of action therefore commenced at once. The

decision in *Barton* v. *North Staffordshire Ry. Co.* (1), on which the claimants may rely, is based on the fact that the claim in that case was that the plaintiffs were stockholders.

[ROMER J. Was not the crediting of the dividends to the shareholders in the books a declaration of trust?]

No; a company must balance its books in some way, and the entries were not a declaration of trust.

It is immaterial in this case whether the period of limitation is six or twenty years, but one legal author doubts whether, in the absence of a provision in articles of association providing that dividends unclaimed for less than twenty years may be forfeited, less than that time will bar the right to dividends declared but not paid: Palmer's Company Precedents, 6th ed., Part I., p. 373.

[ROMER J. I do not follow what Mr. Palmer says as to twenty years being the period of limitation.]

The entries in the books and accounts were not a sufficient acknowledgment to take the case out of the Statute of Limitations: *Bush* v. *Martin.* (2)

Dibdin, for the persons entitled to take out administration to the estate of Robbins. The original company was in a fiduciary position towards the shareholders in respect of the dividends, and cannot set up any statute of limitations.

[ROMER J. Would not the new company formed in 1879 be merely in the position of a debtor?]

No; it took the money with notice of the trust. Romilly M.R. held that the Statute of Limitations could not be set up as an answer to a claim for dividends against a coal-mining company which had been carried over to a separate account in its books: *Penny* v. *Pickwick.* (3)

[ROMER J. The company in that case was not a corporation but a mere partnership.]

Shareholders have obtained discovery on the ground that they were cestuis que trust: *Gouraud* v. *Edison Gower Bell Telephone Co. of Europe.* (4) Table A to the Companies Act, 1862, clause 76, gives an express power to forfeit unclaimed dividends,

(1) 38 Ch. D. 458.
(2) 2 H. & C. 311.
(3) 16 Beav. 246.
(4) 57 L. J. (Ch.) 498.

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and this seems to be a recognition that such a clause is necessary in order that the directors may withhold payment.

[ROMER J. What made the company a trustee—was it the declaration of the dividend?]

Not that alone. But there were also entries in the books, in which the shareholders have an interest, and the money was ear-marked for years, and kept apart for the shareholders to whom it belonged. The position of the claimants, if not that of partners, is analogous to it.

[ROMER J. referred to *Smith* v. *Cork and Bandon Ry. Co.* (1)]

So far as that case decides that directors are not trustees it is contrary to the later decision of the Court of Appeal in *In re Lands Allotment Co.* (2), which clearly shews that they are trustees for the purpose of Statutes of Limitation. [He also referred to Lindley on Partnership, 5th ed. pp. 510, 511, and Chadwyck-Healey on Companies, 3rd ed. p. 105.]

W. M. Cann, for Sherborne's legal personal representative. *Smith* v. *Cork and Bandon Ry. Co.* (1) is distinguishable because in that case there was no fund in the hands of the directors. Here the entries in books of account, and the half-yearly accounts sent to the shareholders which referred to an item of "Unclaimed dividends," amounted to a declaration of trust.

The period of limitation, if any applies, seems to be twenty years, because the share certificate was probably under seal and contained coupons for the dividends. If dividend-warrants were issued, no cause of action would arise until the warrants had been presented for payment and dishonoured.

March 9. ROMER J. The liquidators have raised, as they were entitled to do, the defence of the Statute of Limitations in answer to the claims for unpaid dividends, which I have to consider. That defence is, in my opinion, fatal to the claims. The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by Lindley L.J. in the passage in his treatise on Company Law (p. 437), which

(1) I. R. 5 Eq. 65. (2) [1894] 1 Ch. 616.

was cited in the argument before me. Presumably, therefore, the Statute of Limitations began to run in favour of the company from the time the dividends became payable.

But the claimants contend that the statute never began to run against them, on two grounds. In the first place, they contend that the company was in the position of a trustee for them of these dividends. In my judgment, this was not so. The declaration that the dividend was payable did not make the company a trustee of it for the shareholders. Nor did the company or its successor, the amalgamated company constituted by the Act of 1879, ever constitute itself a trustee. In the books of the two companies an account was kept as of a liability in respect of the unclaimed dividends. But the entry in the books of a debtor of a liability to a creditor does not constitute the debtor a trustee of the amount of that liability for the creditor. There was no setting apart of any special part of the assets of the companies as being or representing these dividends, nor was any notice given to the shareholders, or any step taken by the companies, which, so far as I can see, could be treated as putting the companies in the position of trustees or as preventing the Statute of Limitations from running in their favour.

In the next place, the claimants contend that the statute did not run, on the ground that the shareholders and the company were in the position of partners, or in an analogous position. In my opinion that contention is untenable. Nor can I see that the reasons upon which the rule is founded, that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership, apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company. The case of *Penny* v. *Pickwick* (1), relied on by the claimants, was one of a simple partnership which Lord (then Sir John) Romilly held under the circumstances was a continuing partnership. In the case of *Barton* v. *North Staffordshire Ry. Co.* (2) Lord Justice (then Mr. Justice) Kay decided that where persons entitled as stockholders in a railway company were suing to establish their position as such,

(1) 16 Beav. 246. (2) 38 Ch. D. 458.

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their cause of action only arose when the company first refused to treat them as stockholders, and that the Statute of Limitations did not commence to run before that refusal. He did not say that the case was, in fact, analogous to a claim between partners, but only that, if the analogy were applicable, it would support his view, because the statute only runs against a partner from the time of his exclusion.

Nor is the claimant's contention supported by the fact that, for many purposes, the directors of the company are held to be in a fiduciary position with regard to their shareholders as shewn by the cases, referred to by the claimants, of *Gouraud* v. *Edison Gower Bell Telephone Co. of Europe* (1) and *In re Lands Allotment Co.* (2) For these reasons, in my opinion, the claims fail. I should add that, though I cannot find any decision of the English Courts on the point I have had to consider, the view I am taking was expressed in the Irish Court of Appeal by Christian L.J. in the case of *Smith* v. *Cork and Bandon Ry. Co.* (3)

Solicitors for the liquidator: *Field, Roscoe & Co., for James Wintle & Son, Newnham.*

Solicitors for Sharpness Company: *Peacock & Goddard, for Haines & Sumner, Gloucester.*

Solicitors for Robbins' representatives: *Janson, Cobb & Co., for Haygarth & Lawrence, Cirencester.*

Solicitor for Sherborne's representative: *Arthur Cheese.*

(1) 57 L. J. (Ch.) 498. (2) [1894] 1 Ch. 616.
(3) I. R. 5 Eq. 65, 75.

F. E.

In re MID-KENT FRUIT FACTORY.

[1892 M. 097.]

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1896 Jan. 17.

Company—Winding-up—Set-off—Mutual Dealings—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

The characteristic of mutuality is still as necessary under the mutual credit clause of the Bankruptcy Act, 1883, as under the mutual credit clauses of prior Bankruptcy Acts, in order that a set-off may be claimed.

Where moneys of a company are paid to a person for certain specified purposes, and after those purposes are satisfied a balance remains with the payee, he cannot, if a winding-up takes place, set off a debt owing to him by the company unless he can shew that the balance was retained by him with the consent of the company.

Resolutions for winding up the Mid-Kent Fruit Factory, Limited, voluntarily were passed in March, 1892, and on April 2, 1892, an order was made continuing the winding-up under the supervision of the Court.

Messrs. Saunders, Hawksford & Bennett acted as solicitors to the company from its formation to the commencement of the winding-up, and for some time afterwards.

The company owed them for their services costs which by consent, and by permission of the registrar, were fixed at 325*l.*

After the amount had been ascertained, the solicitors claimed to set off the 325*l.* against the sum of 93*l.* 19*s.*, money of the company which was in their hands at the commencement of the liquidation, and to prove for the balance. The liquidator was not previously aware that the solicitors held the money.

Between January 15, 1892, and the winding-up the solicitors did work for the company the costs of which exceeded 93*l.* 19*s.*, and that amount was arrived at as follows:—

In the beginning of 1892 the company was pressed by various creditors. The solicitors were instructed to settle certain of the claims, and the company on January 13, 1892, handed them two cheques for 199*l.* 6*s.* and 20*l.* 10*s.* On January 22 the company handed them a cheque for 45*l.* 7*s.* 6*d.*, and on February 6, 1892, a cheque for 24*l.* 1*s.* 10*d.*, the total amount being 289*l.* 5*s.* 4*d.* These cheques were given for the purpose

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of paying the claims in full in case arrangements could not be made with the creditors; and the minute of a resolution passed at a meeting of the directors on January 12, 1892, and a letter from the company to the solicitors of the same date, shewed that the 199*l.* 6*s.* was sent in respect of the debt of Spencer, Whatley & Co., and that for 20*l.* 10*s.* for the debt of Dillmore & Brown, judgment having been recovered against the company for these debts.

The solicitors were instructed to try to settle the debts for 10*s.* in the £.

On January 13, 1892, the solicitors acknowledged the receipt of these two cheques. Their letter stated: "The cheques will not settle the judgments, as the costs have to be paid. We do not know what the costs will be, but please send us a cheque for 20*l.*, as they will amount to something like that."

The solicitors induced Spencer, Whatley & Co. to settle on the terms of payment of their costs, and of 10*s.* in the £ on their debt, and bills for the balance. This was reported to the chairman of the directors, and the solicitors were instructed to send and sent a cheque for 100*l.* to Spencer, Whatley & Co.'s solicitors in respect of the debt on January 14, and on January 27 paid them 11*l.* 11*s.* for costs.

Dillmore's claim was settled by payment of 25*l.* 10*s.*, which was 5*l.* more than the sum received from the company for that purpose.

The cheque of January 22, 1892, was sent to pay the 11*l.* 11*s.* costs, and a debt (with costs) of 34*l.* 3*s.* 6*d.* owing to Messrs. Bridges & Co., and paid on that day, and the cheque was 7*s.* too little. The cheque of February 6 (for 24*l.* 1*s.* 10*d.*) was sent for payment of a debt of the same amount paid by Messrs. Saunders & Co. on February 9.

The items of cheques and payments appeared on the credit and debit side of an account with the company kept by Messrs. Saunders & Co. in their books. The balance of 93*l.* 19*s.* was substantially what was left out of the 219*l.* 16*s.* represented by the two cheques sent on January 13, 1892, after payment of 100*l.* and 25*l.* 10*s.*

In the winding-up the question was raised whether the solicitors could set off the costs against the balance of 93*l.* 19*s.*

Micklem, for the liquidator. There is no right of set-off. The case is governed by *In re Pollitt.* (1)

C. E. E. Jenkins, for the solicitors. The case relied on is distinguishable. In that case the bailment of the money was not determined till the bankruptcy. Where money is paid for a specific purpose and that purpose is unfulfilled, the money cannot be retained for another purpose.

But here the specific purpose for which the money was paid has been fulfilled completely, and there is a balance. The company was informed of what had been done, and the balance may be retained to pay the costs. It is unnecessary to say that the solicitors can set off the costs; it is enough to say that they can counter-claim for the amount—at any rate, if they can shew that there have been "mutual dealings" within the meaning of s. 38—the mutual credit clause—of the Bankruptcy Act, 1883. There have been mutual dealings: work has been done, after the money was received, which results in a money demand exceeding the amount of the balance. There was no dealing resulting in a money claim in *In re Pollitt* (1), as the purpose for which the money was paid was subsisting when bankruptcy took place, and the bankruptcy determined the bailment. In this case the debt was due before the winding-up.

[VAUGHAN WILLIAMS J. Under the section there must either be a debt or a transaction the natural result of which will be a debt. He also referred to *Jack* v. *Kipping.* (2)]

The section applies to all demands provable in bankruptcy, as well in respect of debts as of damages, liquidated or unliquidated, provided they arise out of contract: *Palmer* v. *Day & Sons.* (3) [He also referred to *Peat* v. *Jones & Co.* (4); *Booth* v. *Hutchinson.* (5)]

Micklem, in reply, referred to *Re Cullen* (6); *Stumore* v. *Campbell & Co.* (7)

(1) [1893] 1 Q. B. 175; on appeal [1893] 1 Q. B. 455.
(2) 9 Q. B. D. 113.
(3) [1895] 2 Q. B. 618, 621.
(4) 8 Q. B. D. 147.
(5) L. R. 15 Eq. 30.
(6) 27 Beav. 51.
(7) [1892] 1 Q. B. 314.

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VAUGHAN WILLIAMS J. The question to be decided is raised on an agreed statement of facts, according to which certain sums were deposited with the solicitors for certain specific purposes. Mr. Jenkins, who appears for the solicitors, does not deny that so long as the moneys were retained in hand for those purposes there could be no right of set-off; but he says that before the winding-up commenced those purposes had been fulfilled, and the money had been applied, so far as they could be applied, in payment of the creditors who had agreed to take less than the full amount of their debts; that there was no longer any specific purpose to which the money was to be applied; and that from that time forward the money remained in the hands of the solicitors as a debt due to the company; and that the solicitors are entitled to answer the claim of the liquidator by setting off their claim for costs against the balance in their hands. I think Mr. Jenkins would have been right if the money had remained in the hands of the solicitors with the consent or knowledge of the company after the composition and costs had been paid. In that case the 93*l.* would be a mere debt from the solicitors to the company. But the liquidator denies that the money ever did remain in the hands of the solicitors with the consent of the company. Primâ facie, the money having been, admittedly, paid to the solicitors to be applied for specific purposes, it would continue in their hands for those purposes, and their duty would be to return the balance. The onus is on the solicitors to shew the company's consent to the money remaining in their hands; and I fail to find that the consent was given, or that the solicitors ever communicated to the company that they had the balance in their hands. The only statement of such a balance is on the debit side of an account in their own books; but there was nothing to shew the company knew that they had a balance in hand. The liquidation commenced shortly afterwards, and nothing happened to change the original purpose for which the money was paid. That being so, I cannot accede to the argument that the solicitors are entitled to a set-off.

I propose to say a few words as to the law as it now stands, as that may be useful in future cases. The law as to mutual

credits has been modified in the Bankruptcy Act, 1883, by the introduction of the words as to mutual dealings, and now many matters come within the section referring to mutual credits which would not have fallen within the corresponding section in the prior Acts. The necessity for mutuality, however, has not ceased to exist.

At one time it was supposed that there must be mutual debts; then that there must be mutual transactions which must result in a debt; and then the proposition was widened, and it was said that it would be sufficient if the transactions were such as would probably result in a debt. Then came the Bankruptcy Act, 1883, the result of the provision in which is to include all mutual dealings between two parties. Still the characteristic of mutuality must always be present. The judgment of Lord Russell C.J. in *Palmer* v. *Day & Sons* (1) was cited to me, and, as I understand, for the purpose of shewing that in the present state of the law no such mutuality is necessary, and that every claim provable in bankruptcy necessarily falls within the mutual credit section. He did not, in my opinion, decide anything of the sort. When one looks at his words, it seems plain that he did not intend that. He says (2): "The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated *provided they arise out of contract.*"

He there clearly limits the operation of the section by these few words. The present claim of these solicitors to retain the moneys does not arise out of contract at all. It is a claim to retain moneys, which were paid into their hands for a specific purpose, for another purpose which was in nowise contemplated by the contract of bailment. Then it was suggested that a claim in respect of a tort also fell within the section: but I pointed out that it was clear from *Jack* v. *Kipping* (3) that a claim for damage for misrepresentation, which was in one sense a claim in respect of a tort, was only allowed to come

(1) [1895] 2 Q. B. 618. (2) [1895] 2 Q. B. 621.
(3) 9 Q. B. D. 113.

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In re MID-KENT FRUIT FACTORY.

within the mutual credit clause on the ground that the claim of the trustee, being for the price of goods, the misrepresentation which led to the purchase of the goods was a mutual dealing as between the purchaser and the bankrupt vendor. Having said that, I do not think it is necessary for me to say more than that in my judgment there can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it to a specific purpose, and that bailment was never determined, and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended.

Solicitors: *Waterhouse & Co.; Saunders, Hawksford & Bennett.*

F. E.

MILLER *v.* COLLINS.

[1895 M. 261.]

C. A. 1895 STIRLING J. *Nov.* 2, 9. C. A. 1896 *Feb.* 4, 5, 6. 24.

Married Woman—Reversionary Life Interest—Assignment—Beneficial Interest in Trust Money Invested on Mortgage of Realty—"Estate"—"Interest in Land"—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77—*Mortmain Act* (9 *Geo.* 2, *c.* 36), *s.* 3.

In a case not falling within Malins' Act (20 & 21 Vict. c. 57):—

Held, by Lindley and A. L. Smith L.JJ. (Kay L.J. dissentiente), that a married woman's equitable reversionary life interest in a sum of money, properly invested by her trustees upon a mortgage of land, is an interest in land within s. 77 of the Fines and Recoveries Act, so that she can dispose thereof by deed acknowledged and with her husband's concurrence.

The decision of Stirling J. reversed.

In re Newton's Trusts (23 Ch. D. 181) overruled.

By an indenture of settlement dated October 31, 1855, and made between William Charles Clayton of the one part, and Richard Arthur Dufty of the other part, certain real estate was conveyed to the use of the said R. A. Dufty and his heirs upon trust to pay the rents thereof to the said W. C. Clayton during his life, and after his death upon trust for Emma Clayton, the wife of the said W. C. Clayton, during her life and widowhood, with divers remainders over; and power was given to R. A. Dufty to sell the premises and to invest the moneys produced by the sale in any of the public stocks, or upon mortgage of freehold, copyhold, or leasehold premises; but the settlement did not authorize the investment of such moneys in the purchase of land. In pursuance of that power, and before July 21, 1869, part of the real estate comprised in the indenture of settlement had been sold for 1100*l.*, and that sum had been duly invested upon mortgage of real estate.

By an indenture dated July 21, 1869, W. C. Clayton and Emma his wife conveyed their respective life estates in the unsold portion of the real estate comprised in the settlement to Edward Hardy and his heirs, and assigned all the right and interest of them the said W. C. Clayton and Emma his wife respectively in and to the dividends, interest, and annual

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produce arising or thereafter to arise from the said trust fund of 1100*l.* unto Edward Hardy, his executors, administrators, and assigns absolutely. This indenture was duly acknowledged by Emma Clayton under the Fines and Recoveries Act.

W. C. Clayton died in April, 1893, leaving Emma Clayton him surviving. All the interest of Edward Hardy under the indenture of July 21, 1869, was subsequently acquired by the defendant Richard Collins, and by an agreement in writing dated July 7, 1894, he agreed to sell, and the plaintiff William Miller agreed to purchase, the life interest of Emma Clayton, the widow of W. C. Clayton (determinable upon her remarriage), in the said sum of 1100*l.* so invested on mortgage as aforesaid for the sum of 210*l.*, whereof 21*l.* was paid as a deposit.

After delivery of the abstract of title the plaintiff took the objection that the indenture of July 21, 1869, was invalid, and ineffectual to pass the interest of Emma Clayton, inasmuch as such interest was at the date of that indenture a reversionary life interest in personal estate created by an instrument made before December 31, 1857, and consequently was not within Vice-Chancellor Malins' Act (20 & 21 Vict. c. 57), which only enabled married women to dispose of reversionary interests in personal estate arising under instruments (other than settlements on marriage or instruments restraining alienation) made after that date.

Emma Clayton died in December, 1894; and, on January 23, 1895, the plaintiff brought this action against the defendant for a declaration that the deed of July 21, 1869, was ineffectual to assign Emma Clayton's reversionary life interest in the 1100*l.*, and that the defendant had shewn no title to her life interest; and he claimed delivery up of the agreement for the sale, and return of his deposit. The defendant counter-claimed for payment of the balance of the purchase-money with interest, or for damages for breach of the agreement.

The action was tried before Stirling J. on November 2 and 9, 1895.

Hastings, Q.C., and *T. Douglas*, for the purchaser. The settlement being dated October 31, 1855, Malins' Act has no

application: *In re Elcom.* (1) At the date of the execution of the deed by Emma Clayton her interest was not an interest in land within the meaning of the Fines and Recoveries Act, s. 77, and she could not, therefore, dispose of it by deed acknowledged under the provisions of that Act.

No doubt it has been held that a married woman can convey her interest in real estate which is vested in trustees upon trust for sale so long as conversion has not actually taken place, her interest being an equitable interest in land: *Briggs* v. *Chamberlain* (2); *Tuer* v. *Turner* (3); but where the property has been sold and the conversion is complete she can no longer dispose of her interest under the Act. Sect. 77 refers to the actual state of things at the time the deed is executed by the married woman: *In re Newton's Trusts* (4); and here, at that time, the property had actually been converted.

There was a notion at one time that if the conversion was wrongfully made the doctrine did not apply; but that contention is unfounded: *In re Durrant and Stoner.* (5)

The exact point was decided in *In re Algeo.* (6) Both on principle and authority, from the time that the property was sold under the power, Mrs. Clayton could not in any way deal with her reversionary interest in it.

But it is suggested that, the proceeds of sale having been invested upon a mortgage of real estate, Mrs. Clayton had still, at the date of conveyance, an interest in land. That is covered by *In re Newton's Trusts.* (4) The purchaser is entitled to the declaration for which he asks.

Willis Bund, for the vendor. Mrs. Clayton was in a position to convey her interest in the property by deed acknowledged under the Act: *Briggs* v. *Chamberlain.* (2) In *Williams* v. *Cooke* (7) it was held that a married woman could by deed acknowledged dispose of her reversionary interest in a debt secured on land by deposit of deeds.

(1) [1894] 1 Ch. 303.
(2) 11 Hare, 69.
(3) 20 Beav. 560.
(4) 23 Ch. D. 181.
(5) 18 Ch. D. 106.
(6) I. R. 2 Eq. 485.
(7) 4 Giff. 343.

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[STIRLING J. That was dealt with by Chitty J. in *In re Newton's Trusts* (1); he pointed out that the married woman was not the owner of the debt, but that it belonged to the trustees.]

In that case she had only an undivided share, and it was held that she could not dispose of it without joining other parties. Here the only person interested was the wife. She had a limited interest, the whole of which she disposed of. The ratio decidendi of *In re Newton's Trusts* (1) fails here, and it is therefore no authority.

In re Algeo (2) was decided on the construction of the Irish Act, and is not binding on this Court. It was only a decision that where money which has been charged on land has been paid off, it ceases to be an interest in land. The object of the Fines and Recoveries Act was to give greater facilities to married women to deal with their reversionary interests. In the absence of a binding authority the Court will not hold that Mrs. Clayton could not dispose of her interest under the Act.

Hastings, Q.C., in reply. Mrs. Clayton was not the owner of the mortgage debt. It is the "owner of the debt" who has the interest in land. *Williams* v. *Cooke* (3) is therefore not applicable in this case.

Cur. adv. vult.

1895. Nov. 9. STIRLING J. stated the facts of the case, and continued:—It was common ground that Vice-Chancellor Malins' Act has no application. On behalf of the vendor, it was said that the interest of Mrs. Clayton was an interest in real estate, and that she was entitled to dispose of it under the provisions of the Fines and Recoveries Act. [His Lordship then referred to s. 77, and to the definition of the word "estate" in s. 1 of that Act, and continued:—]

The decisions which have already been given upon the meaning of that clause appear to me to lay down this rule, that in determining whether or not the interest purported to be conveyed or disposed of by a deed acknowledged by a married woman is or

(1) 23 Ch. D. 181. (2) I. R. 2 Eq. 485.
(3) 4 Giff. 343.

is not an interest in real estate, the critical moment to be considered is that of the execution of the deed. You are to ascertain whether at that time the married woman was or was not in fact entitled to an interest in real estate. If she was so entitled, then the provisions of the Act enable her to deal with it. If she was not so entitled, then the provisions of the Act do not apply. No clearer illustration of the rule could be found than in the decision of the Court of Appeal in *In re Durrant and Stoner*. (1) There the trustees of a personalty settlement had in breach of trust invested part of the trust fund in the purchase of land, and took a conveyance to themselves. Two married ladies were entitled to reversionary interests in that fund. By a deed, which was acknowledged by these ladies, the persons interested, including the trustees, conveyed the real estate in which the trust funds had been invested, and it was held that although a breach of trust had been committed, and although, in accordance with the provisions of the trusts of the settlement, the fund ought to have been invested in personalty, still the married ladies were at the date of the deed entitled de facto to an interest in land, and therefore had power to convey the land. Moreover, it has been held in a series of cases—*Briggs* v. *Chamberlain* (2), *Tuer* v. *Turner* (3), and *In re Jakeman's Trusts* (4)—that a married woman can convey her interest in real estate which is vested in trustees upon trust for sale, so long as a sale has not been made and the trust property remains in the shape of real estate. That I take to be well-established law; although in an early case of *Hobby* v. *Collins* (5) Knight Bruce V.-C. expressed a different opinion, which, however, has not been followed in subsequent cases. On the other hand, it has been decided in the case of *In re Algeo* (6), before the Master of the Rolls in Ireland, that where lands are vested in trustees for sale, and after a sale has taken place, and the proceeds of sale have been invested in what I may term for this purpose pure personalty—as, for example, Consols—then the married woman has ceased

(1) 18 Ch. D. 106.
(2) 11 Hare, 69.
(3) 20 Beav. 560.
(4) 23 Ch. D. 344.
(5) 4 De G. & Sm. 289.
(6) I. R. 2 Eq. 485.

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to have an interest in real estate within the meaning of the Fines and Recoveries Act. It is said, however, that that case was a decision upon an Irish Act, and that in any case it is not binding on me, and ought not to be followed. But, in the first place, the Irish Fines and Recoveries Act is identical, I may say, for this purpose, with the English Act; and, in the second place, I think the decision is quite right and in accordance with principle, and that I ought to follow it. I may add that it is supported by the weighty opinion of Lord St. Leonards in his Treatise on the Real Property Statutes, 2nd ed. at p. 233.

That, then, being the general rule, I have to consider how it is to be applied in the present case, in which the proceeds of sale have not been invested in a pure personal investment, such as Consols, but upon a mortgage of real estate. Now on that again there is authority. In the case of *Williams* v. *Cooke* (1), before Stuart V.-C., where a married woman who prior to her marriage was entitled under a will to a debt, payable after the death of her sister, secured on land by the deposit of title-deeds, by deed acknowledged joined her husband in assigning her share and interest in the debt and the real security in order to secure moneys due by her husband, it was held that the assignment was effectual.

On the other hand, in *In re Newton's Trusts* (2), where, under the will of a testator, a married woman was entitled to one-third of his residuary estate, subject to the life interest of his widow, and she—this married woman—and the widow who was the tenant for life concurred in executing a deed which was acknowledged by the married woman, under the Fines and Recoveries Act, in assigning two mortgage debts secured to his trustees on real estate and forming part of the residuary estate by way of mortgage, it was held by Chitty J. that the deed was not effectual to pass the married woman's share of the two mortgage debts. [His Lordship then read the passage from the judgment in that case (3), commencing with the words "The decision in *Williams* v. *Cooke*" (1), and concluding with the words "a party to the deed," and continued:—]

(1) 4 Giff. 343. (2) 23 Ch. D. 181. (3) 23 Ch. D. 187.

Mr. Justice Chitty was therefore of opinion that, unless all parties who were beneficially interested in the mortgage debt concurred in the deed, it was not effectual. It appears to me that if that case is well decided, it governs the present. No distinction can under such circumstances be drawn between a life interest and an interest in the corpus. If any distinction is to be drawn, it would be rather more favourable to the interest in the corpus, than to a life interest. I must, however, call attention to a case which was not cited in argument, but which appears to me to have a bearing on the present question. It is a case which arose not under the Fines and Recoveries Act, but under the Act of George II., commonly called the Mortmain Act, by which, as we all know, certain gifts of real estate and interests in real estate were prohibited. The words are: "All gifts . . . . of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments," shall be null and void unless made in the prescribed way. It has often been the duty of the Courts to consider the question whether an interest given to a charity by will was or was not an interest in land within the meaning of that Act. Now it so happened that a case occurred under the Mortmain Act which gave rise to questions very similar to that which has arisen before me under the Fines and Recoveries Act. I refer to the case of *In re Watts.* (1) There the testator gave the residue of his personal estate for charitable purposes. At the time of his death the estate comprised three mortgage debts—one of which was a sum of 100*l.* due on the security of a mortgage of the life interest of a lady under the will of her father in the sum of 3000*l.*, invested in the names of the trustees of the father's will on a mortgage of real estate. So that case is as close as possible to that before me. The other two mortgage debts were due to the testator on mortgages of a life interest of a tenant for life, and of the vested reversionary interest of one of her daughters in a moiety of those funds, and the greater part of those trust funds was invested in the names of trustees of the settlement

(1) 27 Ch. D. 318; 29 Ch. D. 947.

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on a mortgage of real estate. So that in one case it had to be considered whether the life interest of the lady in funds invested on a mortgage of real estate was an interest in land, and in the other whether the reversionary interest of the lady entitled to a share of corpus of funds similarly invested was also real estate. Pearson J. decided that the first—the life interest—was not an interest in real estate; but he decided that the second—the interest in the corpus—was. The ground on which he proceeded was this: that as regards the first, the testator did not take any real interest in the original mortgage; he had simply the right to take the income arising from the investment. He could not by any foreclosure or otherwise acquire any interest in the real estate itself. But as to the second, he says (1): "It appears to me that by virtue of these two mortgages the testator had the control over the whole of the trust funds; he might have foreclosed both mortgages and thus have acquired the property in the state in which it was actually invested." There was an appeal from the second decision—that is to say, as to the share of the corpus; but there was none from the first decision as to the life interest. The judgments which were delivered in the Court of Appeal appear to me to require consideration. Cotton L.J., after stating the facts, says this (2): "Whether all persons interested in the trust funds were parties to the mortgages I do not think material." So that he considered it an immaterial circumstance that a share only was given. He says: "We must first look at the statute. It is often argued that a case is not within the mischief indicated by the preamble, and that therefore it must be considered to be out of the Act. This is not sound reasoning—the preamble may be usefully called in where the enacting words are ambiguous, but where they are clear they cannot be cut down by reference to the preamble." Then he reads the statute and continues: "To say that under the gift now in question the charity could never obtain possession of the land, is attempting to draw us aside from the consideration of the real question, which is whether an interest in land is attempted to be given. Part of the property held on the trusts of Mrs.

(1) 27 Ch. D. 322. (2) 29 Ch. D. 950.

Smith's marriage settlement was invested on mortgage of land, it is therefore impossible to say that the cestuis que trust had not an interest in land." Fry L.J. said (1): "I do not see anything in the preamble which requires us to restrict their meaning, and the question, then, is whether these mortgage debts are or are not charges on real estate. They were charged on the interests of cestuis que trust under a settlement, the funds held upon the trusts of which were partly invested on mortgage of real estate, and in my opinion were therefore charged on real estate. It was contended that, in order to make the statute apply, the charge must be direct, but I decline to interpolate that into the Act."

Now, notwithstanding the great weight which is due to decisions first by Pearson J. and secondly by Chitty J., I confess that the reasons given in the Court of Appeal for the decision in this case of *In re Watts* (2) have created great doubts in my mind, which are not entirely removed, as to whether the decision in *In re Newton's Trusts* (3) and the first decision of Pearson J. in *In re Watts* (2) can be reconciled with the grounds put forward by the Court of Appeal as the basis of their decision in the second case in *In re Watts*. (2)

As regards Pearson J.'s decision, my doubt is whether, if the test which was applied by Cotton L.J. in *In re Watts* (2) were applied to this case, the result ought not to be that the tenant for life has an interest in land under the circumstances there existing as well as the remainderman. Secondly, with regard to Chitty J.'s decision, it is to be observed that Cotton L.J. treated it as immaterial in that case whether all the parties interested in the trust fund were parties to the mortgages; and Fry L.J. expressly negatives the notion that an indirect interest in real estate is not an interest within the meaning of the Mortmain Act.

Now it seems to me that there is no reason for giving a narrower interpretation to the words "interest in land" in the Fines and Recoveries Act than was given by the Court of Appeal to similar words in the Mortmain Act. But the weight

(1) 29 Ch. D. 953. (2) 27 Ch. D. 318; 29 Ch. D. 947.
(3) 23 Ch. D. 181.

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of authority in courts of first instance is in favour of the contention of the plaintiff, and I do not think it would be right for me to depart from those authorities. Of course it will be open, if the doubts which suggest themselves to me appear to the advisers of the defendant to be weighty, to get a further opinion upon the subject; but in my judgment I ought to follow the decision of Chitty J., which appears to me to be directly in point, and also to be supported to a certain extent by the decision of Pearson J. in the first case of *In re Watts*. (1) I therefore propose to give judgment in favour of the plaintiff, and direct the defendant to pay the costs of the action.

G. A. S.

C. A.

The defendant appealed. The appeal came on for hearing on February 4, 1896.

Cozens-Hardy, Q.C., and *Willis Bund*, for the appellant. The wife had an "estate in land" within the meaning of s. 77 (2) of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74),

(1) 27 Ch. D. 318; 29 Ch. D. 947.

(2) By s. 1, "The word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands."

By s. 77, "After the 31st day of December, 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed."

By the Mortmain Act (9 Geo. 2, c. 36), s. 3, "All gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels

and therefore the deed of July 21, 1869, was effectual to dispose of her interest: *In re Durrant and Stoner* (1); *In re Watts*. (2)

[KAY L.J. The latter case was decided upon the Mortmain Act (9 Geo. 2, c. 36), s. 3. The decisions on that Act shew that anything which savours of realty is within it.]

In *In re Harris* (3) Jessel M.R. said (4) that, "in order to create an interest in land, the land must be affected directly." Here the cestuis que trust could by taking proper proceedings compel the trustees to enforce the mortgage security for their benefit; consequently the cestuis que trust have through their trustees an interest in the land.

[KAY L.J. The trustees could foreclose the mortgage and sell the land without any concurrence by the cestuis que trust.]

The definition of "estate" in s. 1 of the Fines and Recoveries Act includes "interest in land," and it is in substance equivalent to s. 3 of the Mortmain Act. Stirling J. followed *In re Newton's Trusts*. (5) But the reasoning of Chitty J. in that case is difficult to follow. He laid stress (6) on the fact that "one of the persons interested in the mortgage debts was not a party to the deed." But in *In re Watts* (7) Cotton L.J. said that he did not think it material whether all persons interested in the trust funds were parties to the mortgages. It is sufficient if the cestuis que trust have an interest in land through their trustees: *Briggs* v. *Chamberlain*. (8) All the cestuis que trust acting together could have required the trustees to transfer the land to them; and if all of them together had an interest in the land it is difficult to say that each of them has not such an interest. The opinion of Stirling J. himself was evidently

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or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the 24th of June, 1736, be made in any other manner or form than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

(1) 18 Ch. D. 106.
(2) 27 Ch. D. 318; 29 Ch. D. 947
(3) 15 Ch. D. 561.
(4) Ibid. 564.
(5) 23 Ch. D. 181.
(6) Ibid. 188.
(7) 29 Ch. D. 950.
(8) 11 Hare, 69.

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in favour of the defendant; but he thought he ought to follow *In re Newton's Trusts*. (1)

Hastings, *Q.C.*, and *T. Douglas*, for the respondent. The deed of July 21, 1869, purports only to assign the annual income of a trust fund, the securities on which the fund was invested not being mentioned. In s. 1 of the Fines and Recoveries Act "estate" is defined as extending to "any interest, charge, lien, or incumbrance in, upon, or affecting lands." Nothing is said about an "interest in an incumbrance on land." If it had been intended to include the latter under "interest in land," it would have been unnecessary to add the words "incumbrance on land." The words "incumbrance, charge, or lien on lands" are contrasted with "interest in land": *Briggs* v. *Chamberlain*. (2) Money subject to a trust for investment in land is in equity considered as land. The term "interest in land" applies to cases in which nothing stands between the owner of the interest and the land. When there is a mortgage the mortgage debt stands between the owner of the interest and the land. This construction makes the decisions on the Act all consistent. What Chitty J. intended to say in *In re Newton's Trusts* (3) was that the married woman was not the absolute mistress of the land, because some other person had an interest in it. In the present case the married woman had only a reversionary life interest in the mortgage debt. This was a reversionary interest in personal estate, not in land. This view is supported by *Williams* v. *Cooke* (4), and by the reasoning of Pearson J. in *In re Watts*. (5) The words of s. 3 of the Mortmain Act are not precisely the same as those of s. 77 of the Fines and Recoveries Act. In *In re Durrant and Stoner* (6) the Court held that the actual state of investment of the trust fund must be regarded, although the investment was unauthorized. The cestuis que trust had adopted the wrongful purchase of land. *In re Algeo* (7) decides that the critical moment is that at which the married woman executes

(1) 23 Ch. D. 181.
(2) 11 Hare, 74.
(3) 23 Ch. D. 188.
(4) 4 Giff. 343.
(5) 27 Ch. D. 318.
(6) 18 Ch. D. 106.
(7) I. R. 2 Eq. 485.

the deed. There is no authority that before the Fines and Recoveries Act a married woman could by means of a fine have bound her limited interest in a mortgage debt secured on freehold land.

At any rate, there being conflicting decisions upon a statute of general import, the Court will not force such a doubtful title upon a purchaser: *Palmer* v. *Locke* (1); *In re Thackwray and Young's Contract* (2); *In re New Land Development Association and Gray.* (3)

Cozens-Hardy, Q.C., in reply, referred to *Forbes* v. *Adams.* (4) In other respects the arguments were similar to those addressed to the Court below.

Cur. adv. vult.

Feb. 24. LINDLEY L.J. delivered a judgment in which A. L. Smith L.J. concurred. After stating the facts, his Lordship said:—

It will be observed that in 1869 Mrs. Clayton's interest in the 1100*l.* was a reversionary interest, and the deed of 1869, so far as her life interest is concerned, could only bind her if such interest could be bound under the Fines and Recoveries Act. Mrs. Clayton did survive her husband, and she was living when the contract for the sale of her life interest by the defendant to the plaintiff was entered into. She has since died, so that her life interest no longer exists, but this circumstance, although unfortunate for the plaintiff, the purchaser, affords him no defence to the claim by the vendor to the purchase-money if the vendor had a good title to convey when she was alive.

The whole question, therefore, is whether a married woman's beneficial interest in a sum of money properly invested by her trustees on a mortgage of land conveyed to them is within s. 77 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74); and on reading that section the above question will be found to turn on whether such interest is an "estate" within the meaning of that word as defined in s. 1 of the same Act.

(1) 18 Ch. D. 381.
(2) 40 Ch. D. 34.
(3) [1892] 2 Ch. 138.
(4) 9 Sim. 462.

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Stirling J. has held that it is not, and he has done so on the authority of a decision by Chitty J., which I will refer to presently; but I gather from his judgment that had it not been for that decision he would have decided this case the other way. [His Lordship then read s. 77 of the Fines and Recoveries Act, and the definition of "estate" in s. 1 of the same Act, and then continued:—]

Now I confess I am quite unable to see the impropriety of describing the interest of a person beneficially entitled to money invested on mortgage held by his trustee as an interest in land. The interest of the cestui que trust is not confined to the money, but extends to the security for it, i.e., to the land held by his trustee. Such land is vested in the trustee, but upon trust for whom? The only possible answer is, upon trust for those persons who are beneficially entitled to the money. If there is only one such person, and he is sui juris, the trustee can be required to transfer the security to him, i.e., to assign the debt and convey the land to him. If there are several such persons, and they are all sui juris and absolutely entitled to the money, and they agree, they can also require the mortgage debt to be assigned and the land to be conveyed to them. These are only illustrations which lead me to say that a cestui que trust of a mortgage debt has an interest in the land. If the debt is so settled that the cestuis que trust have not the right to call for an assignment of the debt to them, they are nevertheless as much cestuis que trust of the whole security and debt and land, and each of them has an interest, though possibly a limited interest, in the one quite as much the other. It is true they can only reach the mortgagor or the land through their trustee; but this does not shew that they have no interest in the land, the legal estate of which is in their trustee. It was contended before us that the words "interest in land" in s. 1 of the Fines and Recoveries Act were used by way of contrast to "charge, lien, or incumbrance on or affecting land," and that Mrs. Clayton's interest was only an interest in a charge or incumbrance, and neither an interest in land nor a charge nor an incumbrance. But this criticism of the language is in my opinion unsatisfactory and unsound. The word "incumbrance"

is wide enough to include charge and lien, and yet all three words are used. Further, I can find no indication of any intention in this Act to make any distinction between a charge or an incumbrance, and a partial interest in a charge or incumbrance. The object of the Act does not require any such distinction to be drawn, nor does the language of the Act. On the contrary, such a distinction would defeat and not promote the object to attain which the Act was passed. The truth is that in defining "estate" no contrast is made or intended to be made between one interest in land and another; but the sentence is framed so as to include all interests legal or equitable in land or money charged upon it or to be invested in its purchase or to arise from its sale; and several words are used by way of precaution to emphasize the meaning and to make sure that nothing intended to be included should inadvertently be omitted. This is how the matter appears to me to stand on principle and on the construction of the Act.

I pass now to consider the authorities; and first I will refer shortly to the decisions on the Act itself. In *Hobby* v. *Collins* (1) Knight Bruce L.J. certainly held that the Act did not enable a married woman to dispose of her reversionary interest in money charged on land or subject to a trust for investment in land. But this case has not been followed; and it had been disapproved by Lord St. Leonards (see his Real Property Statutes, 2nd ed. pp. 232-233). In the following cases such interests have been held to be within the statute: *Briggs* v. *Chamberlain* (2), where a married woman's interest was a reversionary interest in money to arise from the sale of land. *Tuer* v. *Turner* (3) was a similar case. *Williams* v. *Cooke* (4) is another decision in accordance with these: in that case a wife's equity to a settlement turned on the effect of her acknowledged deed on her reversionary interest in a sum of money charged on land.

In re Durrant and Stoner (5) was another case of a reversionary interest in money. The money there was improperly invested in land, but a married woman's interest in it was held

(1) 4 De G. & Sm. 289.
(2) 11 Hare, 69.
(3) 20 Beav. 560.
(4) 4 Giff. 343.
(5) 18 Ch. D. 106.

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bound by a deed executed and acknowledged according to the Act.

These cases can, no doubt, be distinguished in their details from the present, but not, I think, in principle. They are all alike in being reversionary interests in money; and in my opinion it is immaterial whether the money is charged upon, or is to arise from, or is subject to be invested in land.

In *Briggs* v. *Chamberlain* (1) Wood V.-C. emphatically stated, "The question does not turn on the difference between an interest in possession and an interest in reversion. The question is, whether it is an interest in land which can pass by a fine, or by a deed having a like effect."

In *In re Newton's Trusts* (2) Chitty J. appears to have decided the exact point which arises in this case, and to have decided that the reversionary interest of a married woman in money invested by her trustees on mortgage was not within the Fines and Recoveries Act. I confess I have great difficulty in understanding that case. It seems to have turned on the fact that the married woman had a reversionary interest in only two-thirds of the mortgage debt, and that the owner of the other third did not join in the assignment. The decision appears to me to be opposed to those I have mentioned, although no doubt it is consistent with *Hobby* v. *Collins*. (3) I feel compelled to say that I think *In re Newton's Trusts* (2) was decided on too narrow a view of the Act.

On the more general question whether an equitable interest in a mortgage debt is "an interest in land," the decisions on the Mortmain Act (9 Geo. 2, c. 36) are important, for the language of that Act is almost precisely the same as that of the definition of "estate" in the Act for the Abolition of Fines and Recoveries. In *Brook* v. *Badley* (4) Lord Cairns pointed out that a person could not be said to have no interest in land simply because he could not himself actually obtain possession of it; nor because it could be conveyed by trustees without his concurrence. Again, in *In re Watts* (5) Cotton and Fry L.JJ. expressed their clear

(1) 11 Hare, 75.
(2) 23 Ch. D. 181.
(3) 4 De G. & Sm. 289.
(4) L. R. 3 Ch. 672.
(5) 29 Ch. D. 947.

opinion that an equitable interest in a mortgage debt was "an interest in land" in the proper sense of that expression, and within its meaning as used in 9 Geo. 2, c. 36. These decisions confirm the opinion which I entertain myself, and I can discover no reason for holding that the language of the one Act ought to be construed differently from that of the other.

Mrs. Clayton's interest in the 1100*l.* in question might in my opinion be properly regarded either as an interest in land or as an incumbrance upon or affecting it. Her deed not only affected her interest in the land, but also her interest in the money which formed the incumbrance upon it, and which in truth was the foundation and the measure of her interest in the land. Her interest in the land and in the money secured on it is well within the words used to define "estate"; and I see no justification for construing those words narrowly, even if the result may be to enable married women to do more by an acknowledged deed under the Fines and Recoveries Act than they could have done by a fine before the Act passed, or can be done even now under Vice-Chancellor Malins' Act, which excepts money to which they are entitled under their marriage settlements.

Something was said about the vendor's title being too doubtful to force on the purchaser. But there is no risk of eviction or disturbance, and, as pointed out when the case was argued, there is really nothing in this point. The vendor is entitled to the balance of his purchase-money, which is practically the real question in dispute.

For these reasons I am of opinion that the appeal should be allowed, the judgment below reversed, and judgment be entered for the defendant both on the claim and on the counter-claim, with costs both here and below.

KAY L.J. (after stating the facts). The question is whether the equitable life estate in reversion to which Mrs. Clayton was entitled in the income of the 1100*l.* was at the date of the assignment by her in 1869 an "interest in land" within the meaning of those words in the Fines and Recoveries Act, so

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that with her husband's concurrence she could convey it by an acknowledged deed.

If it was, this somewhat peculiar result follows. If the sum had been variously invested, part on mortgage, part in Consols, so much income as was derived from the part secured by mortgage only would pass; the rest would not pass.

The 1100*l.* lent to the mortgagor was a debt due from him. That he gave a security on land for payment of that debt in addition to his personal liability could not make the personal debt of 1100*l.* land, or an interest in land. Formerly a mortgagor used to give a bond for the debt. Now he covenants in the mortgage to pay it. But in either case, at the time of passing the Fines and Recoveries Act all that the mortgagee could do as to the debt was to make an assignment of it, which was only a contract in equity, and give a power of attorney to use the transferor's name to recover it. Could a married woman assign the debt under the Fines and Recoveries Act? If she could, the Act enabled her to make a legal assignment of a debt, which no one else could do. What she attempted to assign in this case was the income during her life in the reversion of the 1100*l.*, not the mortgage security, or any interest in it.

When a question arises as to the meaning and effect of words used in an Act of Parliament, the ordinary mode of solving it is to consider the object of the statute, and to see whether the case comes within the real meaning and purpose of it. The object of the Fines and Recoveries Act was, so far as married women were concerned, to facilitate the transfer of real estate by providing a simpler mode of conveying their interests in it than the somewhat cumbrous device of a fine. Would it facilitate the transfer of real estate to hold that the deed of 1869 passed the married woman's reversionary life estate in the 1100*l.*? Her concurrence was not necessary to enable the trustees to deal with the mortgaged estate. They could convey, transfer, or release it from the mortgage debt without her, and, supposing such acts to be done in the due performance of the trust, she had no power to interfere. Could the Fines and Recoveries Act be intended to enable her to dispose of her reversionary life interest in equity in the income derived from a

debt which was collaterally secured by a mortgage so situated? I asked during the argument whether there was any authority for saying that such an interest could have been transferred by a fine. None was produced, and my impression is that such an interest could not have been so transferred. This would be another reason for presuming that the case did not come within the Act.

Mr. Hastings called attention to the words of s. 1 defining "estate." Sect. 77 enables a married woman to dispose of any estate in land. Sect. 1 says that "the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting lands, either at law or in equity." It was suggested that that must be read "any interest in lands, or any charge, lien or incumbrance upon or affecting lands," and I think that is so. It is correct to speak of an interest in land, but hardly to say an "interest upon or affecting land." Those words "upon or affecting" are rather applicable to "charge, lien or incumbrance."

Then it was argued that "interest in land," as there used, must mean something other than "charge, lien or incumbrance." If it included them, those words would be superfluous. It is not a sweeping clause following those words. I do not rely on this argument. However the words are read, they do not seem to me to express any interest in a debt which is also secured by a charge, lien, or incumbrance on land. The word "mortgage" does not occur in the definition, probably because the Act was only dealing with land, and the word "mortgage," as popularly used, includes both the personal debt and the charge. The words seem to contemplate dealing with the land so as to free it from a charge, lien, or incumbrance when such incumbrance is vested in a married woman, or her concurrence is necessary to deal with it, but not to an assignment of a reversionary interest in equity in money which happens to be secured by a collateral charge or incumbrance, and least of all to an assignment of an equitable reversionary interest for life in such money.

I will refer to the cases which seem to approach most nearly

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to the question we have to consider. In *Goodrick* v. *Shotbolt* (1) a married woman was entitled in equity to a bond and warrant of attorney given before her marriage by her intended husband to her father to secure 300*l.* to her on the death of her husband, if she survived him. Judgment was entered by her father on her warrant of attorney, which thus created a charge upon all the real estate of the husband. The wife joined with her husband in conveying his land by deed and fine in order to extinguish her equitable interest in this charge. She survived her husband and her father, and took out administration to her father, and then, as his administratrix, sought to extend the judgment against her husband's land; and it was held by Lord Keeper Sir Simon Harcourt (afterwards Lord Chancellor Harcourt) that the fine extinguished her equitable right to the charge created by the judgment, and that therefore she could not extend the land under such judgment, but must enter satisfaction upon it. This seems to shew the true operation of a fine in such a case. To extinguish the charge upon the land was a very different thing from assigning the reversionary interest in the 300*l.* to a third person. The fine did not affect the right to the bond debt, nor could it transfer such bond debt.

But a fine might be used to effect a transfer of money which was solely an interest in land. For instance, in *May* v. *Roper* (2) it was held that a fine by a married woman did pass her share of the proceeds of sale of real estate which was devised in trust to sell and to pay part of the proceeds to her; and this was again held in *Forbes* v. *Adams*. (3) In these cases the share of the proceeds, until the sale had actually taken place and the real estate was completely converted, was an equitable interest in the land, and nothing else. So in *Briggs* v. *Chamberlain* (4) land was held in trust for sale, and a cestui que trust of a share in the proceeds, being a married woman, mortgaged her interest, with the concurrence of her husband, by a deed duly acknowledged. This was solely an interest in land, and, therefore, bound by the mortgage. In *Williams* v. *Cooke* (5) a woman,

(1) Prec. Ch. 333.
(2) 4 Sim. 360.
(3) 9 Sim. 462.
(4) 11 Hare, 69.
(5) 4 Giff. 343.

before her marriage, had a debt due to her secured by a deposit of deeds with her; and with the concurrence of her husband she by acknowledged deed assigned this charge by way of mortgage. This was not a reversionary interest; the husband and wife could assign the debt in equity, and under the Act could also make a valid conveyance of the security. All that was decided was that she had no claim on the mortgaged estate which she had joined in conveying. In *In re Durrant and Stoner* (1) trustees improperly invested the trust moneys in the purchase of land, and the cestuis que trust, who were married women, joined with the trustees in selling and conveying the land by acknowledged deed. In that case the married women had a lien on the land, and the trustees could not have conveyed it without their concurrence; so that it came within the words and within the object and purpose of the Act.

In *In re Newton's Trusts* (2) trustees of personal estate invested part of it on mortgage. A married woman was entitled to one-third of the personal estate in reversion after a life estate. She and her husband by a deed in 1854, before Vice-Chancellor Malins' Act, purported to concur with the tenant for life and the other cestuis que trust in reversion in assigning the mortgage debts and all the personal property by way of mortgage, and the married woman acknowledged this deed under the Fines and Recoveries Act. Chitty J. said that the question turned upon the construction of the Fines and Recoveries Act, and that the deed was not sufficient to pass the interest of the married woman in the mortgage debts. The learned judge afterwards referred to the non-concurrence of one of the cestuis que trust in remainder, I suppose because the other cestuis que trust could not alone require a transfer to themselves of the mortgage. But I understand the main reason of the decision to be that what the married woman purported to assign was an equitable interest in a debt secured by mortgage, and not merely "an interest in land" within the meaning of those words in the Fines and Recoveries Act.

But great reliance was placed upon *In re Watts*. (3) That

(1) 18 Ch. D. 106. (2) 23 Ch. D. 181.
(3) 27 Ch. D. 318.

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was a case under the Mortmain Act (9 Geo. 2, c. 36). A testator had bequeathed such part of his personal estate as could by law be so given to charities. Three items were in question: (1.) a mortgage to the testator of an equitable life interest in personal property which was invested on mortgage in the names of trustees; (2.) a mortgage of another equitable life interest and half the reversion in personal property which was invested on mortgage in the names of trustees; (3.) a similar mortgage of the other half. Pearson J. held that the first was pure personalty and passed to the charities, because the testator in that case did not take any real interest in the original mortgage: all he took was the income of the money invested on mortgage. But as to (2.) and (3.), he decided that these were interests in land, because by foreclosing both the testator (the mortgagee of these interests) would become entitled to call upon the trustees to transfer the original mortgage to him, and would then become entitled to the land. There was no appeal as to (1.), the mortgage of the life interest; but as to (2.) and (3.) the case was appealed (1), and the decision of Pearson J. was affirmed, on the ground that these mortgages gave to the mortgagee an interest in land, Cotton L.J. saying (2) that "a mortgage by some of the cestuis que trust of their interests under a settlement, the funds subject to which are invested on mortgage of land, confers an interest in land, and therefore cannot be bequeathed to a charity"; and Fry L.J. expressing an opinion that the charge need not be direct to create an interest in land under the Act.

So far as direct authority can be found, the decision of Chitty J. in *In re Newton's Trusts* (3), and that of Pearson J. in *In re Watts* (4), are against the view that a married woman could transfer her reversionary interest in personal property, which is invested on mortgage in the names of trustees, by acknowledged deed under the Fines and Recoveries Act. The decision in *In re Watts* (1) of the Court of Appeal was under a different statute, and was a case in which the testator was or might become absolutely entitled to the debt and to the

(1) 29 Ch. D. 947.
(2) Ibid. 951.
(3) 23 Ch. D. 181.
(4) 27 Ch. D. 318.

mortgage security, and it does not seem to me to govern the present case.

My opinion is that the equitable life interest in reversion of the married woman in the 1100*l.* in this case could not be transferred by an acknowledged deed under the Fines and Recoveries Act, and consequently that the title was bad, and that the plaintiff should recover his deposit, and that this appeal should be dismissed.

Since Vice-Chancellor Malins' Act (20 & 21 Vict. c. 57), which expressly authorized assignments by acknowledged deeds of personal property to which married women are entitled in reversion under an instrument made after December 31, 1857, not being a settlement made on marriage, this question will not often arise. But it may be that under a marriage settlement a married woman is entitled to a reversionary interest for life in personal property which happens to be invested on mortgage. She cannot assign this under Vice-Chancellor Malins' Act. Can it be that though expressly prohibited by that Act, it can be disposed of under the Fines and Recoveries Act?

Solicitors: *Kennedy, Hughes & Kennedy, for J. A. Hughes, Wrexham*; *Atkinson & Dresser, for P. P. Truman, Nottingham.*

W. W. K.

C. A. 1896 Feb. 27.

In re MASON'S ORPHANAGE AND LONDON AND NORTH WESTERN RAILWAY COMPANY.

Charity Lands—Charity Founded by Deed—Sale by Trustees of Lands under Power in Deed—Consent of Charity Commissioners—"Scheme legally established"—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24, 26—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 7–69.

A deed founding a charity, and duly enrolled under 9 Geo. 2, c. 36, is not "a scheme legally established" within s. 29 of the Charitable Trusts Amendment Act, 1855; and the trustees in whom the lands of the charity are vested cannot sell such lands under a power of sale contained in the deed, otherwise than with the authority of Parliament, or of the Court, or with the approval of the Charity Commissioners.

The meaning of the expression "scheme legally established" defined by the Court; and the decision of Stirling J. (ante, p. 54) affirmed.

APPEAL from the decision of Stirling J. (1)

Mason's Orphanage is a charity founded, in 1868, by a deed of foundation, duly enrolled and perfected in accordance with the provisions of the Act 9 Geo. 2, c. 36, and the subsequent Acts amending the same, whereby certain freehold hereditaments were conveyed by Sir Josiah Mason to trustees for charitable purposes. By clause 60 of this deed the trustees were empowered to sell and convey all or any part of such hereditaments not for the time being occupied as the site of the orphanage or the grounds occupied therewith.

The London and North Western Railway Company having statutory power to take a piece of land forming part of these hereditaments, gave the trustees of the charity notice to treat in respect thereof, and as no agreement with regard to the amount of the purchase-money could be arrived at, the parties proceeded to arbitration, and a sum of about 18,000*l.* was awarded as the price to be paid by the railway company. An abstract of title was delivered to the trustees, and the railway company took an objection to the title on the ground that the trustees were, by the 29th section of the Charitable Trusts

(1) Ante, p. 54.

Amendment Act, precluded from selling without the consent of the Charity Commissioners, and they insisted either that such consent should be obtained, or that the purchase-money should be paid into court under s. 69 of the Lands Clauses Consolidation Act, 1845. The vendors answered that they were not within the restrictive enactment of s. 29, because the deed of foundation, which empowered them to sell and convey all or any part of the charity lands not for the time being occupied as the site of the charity buildings or grounds, was "a scheme legally established" within the meaning of that section, and as such excepted from the restriction.

The purchasers then took out a summons under the Vendor and Purchaser Act, 1874, upon which it was held by Stirling J. that the deed of foundation was not a scheme legally established within the meaning of s. 29, and that unless the trustees acted under the powers conferred by the Lands Clauses Consolidation Acts, and subject to the restrictions therein contained in cases of sales by persons under disability, they could not make a good title to sell and convey the property without obtaining the consent of the Charity Commissioners.

This was an appeal on behalf of the orphanage.

Hastings, Q.C., *Warmington*, Q.C., and *Ingle Joyce*, for the appellants. This case raises the very important question whether s. 29 of the Act of 1855 precludes a charity which has got a power of sale from selling under that power without the sanction of the commissioners. In a sense all trustees of charities have power to sell the charity lands; but a purchaser of real estate from a charity trustee without power of sale would take subject to the obligation of proving, whenever his title was challenged, that the sale was beneficial to the charity. By the Charitable Trusts Act, 1853, trustees of a charity without power of sale by selling with the sanction of the commissioners are in the same position as trustees who, by the terms of their foundation, have such power; and we submit that, reading that Act and the Amendment Act of 1855 together as one Act, and as if s. 29 had been in the Act of 1853, it was not intended by the section to prohibit trustees with powers from exercising those

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powers, and to impose upon them the obligation of obtaining the approval of the board, but to provide that, where a charity has not got an express power of sale, the sanction of the commissioners when given should be equal to an express power, which is only another way of saying that an express power of sale is equal to such sanction.

But, at any rate, this charity is within the exception, for the deed of foundation is "a scheme legally established."

[Kay L.J. It may be a "scheme"; but is it "legally established"?]

The sections in the Act of 1853 with reference to "schemes" are ss. 8, 36, 39, 42, and from 54 to 60. A scheme is a plan, arrangement, or document defining what is to be done with regard to the charity. It may be an Act of Parliament, a foundation deed, or a decree, shewing what the trusts of the charity are. In *Attorney-General* v. *Dulwich College* (1), Edward Alleyne, in pursuance of a licence by letters patent, "established the college," conveyed the lands, and "established" the ordinances. "Legally established" means established in any manner known to the law, or established in accordance with the requirements of the law. The use of the expression "judicial order" in s. 16 of the Act of 1853, and of the expression "legally authorized" in s. 27, shew that "legally established" in the Amendment Act of 1855 does not mean "judicially established" by order or decree. Is not a charity founded by a proper deed "legally established"? It is established in a way known to and recognized by the law. Is it to be decided now that no man desirous of founding a charity can give the trustees of his charity power to sell or lease its property without the consent of the board? The expression "legally established" must mean something different to and not included in the earlier exceptions of "Act of Parliament," or "court or judge of competent jurisdiction." Again, "scheme" in this section does not mean scheme ad hoc, but general scheme.

[Kay L.J. "Established" must mean something done from outside in order to set up the scheme.]

(1) 4 Beav. 255.

With submission the same document can contain this scheme and establish it. Here the deed of foundation was enrolled and perfected as required by law.

[Lindley L.J. I do not think that a trust deed enrolled is a "scheme legally established."]

The main object of the authorization of sales of charity lands by the board was that the board might see that the best price was obtained for them, and how can that be applied to a case like the present if it is within the section? Here the charity was served with notice to treat under the Lands Clauses Consolidation Act, 1845, s. 7. The price has been fixed, and as between the vendors and the company it is now a mere matter of conveyance. This is not agricultural land, but land in the centre of Birmingham, and the main object of the intervention of the board would be gone unless they had the power to say, "We are not satisfied with this price, and we are not bound by the arbitration." Could they do so?

[Lindley L.J. The railway company have power to take charity lands compulsorily; and if they exercise their power, and the proceedings take place under the Lands Clauses Consolidation Act, 1845, there does not seem to be any difficulty at all; but you do not want to pursue that course. You wish to go on under your power of sale.]

If we proceed under the Lands Clauses Consolidation Act, the purchase-money would have to be paid into court under s. 69 of the Act of 1845, to which we object; and if we cannot convey without the sanction of the board, the company would have to execute a deed poll, and we should have to petition for payment out.

[Lindley L.J. The question would remain whether you could get it out without serving the Charity Commissioners. But that can be decided when it arises.]

There is authority that purchase-moneys paid into court under the Lands Clauses Consolidation Act as the price of charity lands will be paid out to the trustees of the charity as persons absolutely entitled thereto: *Ex parte Trustees of Tid St. Giles' Charity* (1); *In re Spurstowe's Charity*. (2) There

(1) 17 W. R. 758.

(2) L. R. 18 Eq. 279.

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appears, however, to be conflicting cases: Browne and Theobald on Railways, 2nd ed. p. 182, *note* (*g*).

In the present instance the difficulty can be got over by proceeding entirely under the Lands Clauses Consolidation Act, 1845, because then the case would come within the exception in s. 29 of the Act of 1855 of sales under the express authority of an Act of Parliament; but this is not a mere academical discussion. The trustees of this charity have vested in them a very large and valuable estate. They have already sold a considerable portion of it. This is the first time that the objection has ever been taken with regard to their powers, and they have more property which is available for sale and probably will be sold in course of time.

[Lindley L.J. The question is a very important one, for if you are right it will become the custom for people who endow charities always to give the trustees power of sale.]

On the other hand, if the consent of the Charity Commissioners is required to the exercise of express powers, the donees of such powers will be greatly hampered by having to get, even upon the sale of half an acre, a consent which it necessarily takes time to procure, and advantageous contracts may go off in consequence.

[They also referred to *In re Campden Charities* (1); *Corporation of the Sons of the Clergy and Skinner* (2); The Charitable Trusts Act, 1853, s. 32.]

Underhill, for the railway company, was not called upon.

Lindley L.J. There does not appear to me to be any doubt about the point. I cannot improve upon Stirling J.'s judgment, or make the case plainer than he has done, and I will content myself with reading the section. Bearing in mind that the Act of 1855 is, according to the first section, to be construed as one Act together with the Charitable Trusts Act of 1853, and that "any provisions of the principal Act inconsistent with this Act are hereby repealed," I think that s. 29 of the Act of 1855 is an additional section to the Act of 1853. On the Act of 1853 alone (3) this point could not arise, because that Act does not

(1) 18 Ch. D. 310; 24 Ch. D. 213. (2) [1893] 1 Ch. 183. (3) See s. 24.

contain any prohibition such as we find in s. 29 of the subsequent Act of 1855. That prohibition is as follows: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion," and so on. Now the language of that section is plain enough, and it is admitted by the appellant that it is a prohibition subject to certain conditions. If the trustees or other persons in question can make out that they have got the express authority of Parliament, either under any Act already passed or hereafter to be passed, or that they have got the authority of a court or a judge of competent jurisdiction, or that they have got "a scheme legally established," or the approval of the board, then all goes well; but, if they have not got any one of those things, then the prohibition is absolute.

Now, it is not contended that the trustees in this case have got any of these requisites except "a scheme legally established." The question is accordingly reduced to, What is the real meaning of those words? I do not think that any lawyer who knows anything at all about charities, and who has been accustomed to the language which is applied to charities, would hesitate for a moment in saying that "a scheme legally established" is a technical expression, and has a definite meaning as applied to charities. I understand it to mean a scheme either sanctioned by the Court of Chancery, or sanctioned by those other Courts which under the Act of 1853 could sanction schemes. I cannot read the language "according to a scheme legally established" as equivalent to "according to trusts duly declared." That is not the meaning of it, and nobody conversant with the language usually applied to a scheme would ever think that it was.

The construction put upon the section by Stirling J. is correct. I cannot improve on his judgment, and the appeal must be dismissed with costs.

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Kay L.J. I agree. I think that Stirling J.'s judgment is quite accurate in every point, and I think that having regard to the history of the legislation relating to charitable trusts, and the dealings with such trusts by the Court of Chancery, the grammatical meaning of the words in this s. 29 of the Act of 1855 is quite unmistakable. It was always the case that the Court of Chancery would under certain circumstances interfere in the administration of a charity, and direct "a scheme" for its future administration. The word "scheme" has a meaning with reference to charities which was completely settled and thoroughly well known long before this Act was passed, and, therefore, where the word "scheme" is used instead of "trust" or any ordinary word which would describe a trust, primâ facie "scheme" must mean that which the Courts have always understood by that word in relation to a charity, unless there is something in the context which contradicts that meaning. Now, is there anything in the context which contradicts it? To my mind the context shews plainly that that was the meaning of the word "scheme" in this section, because you have got appended to the word "scheme" "legally established." I will go back 150 years and take Lord Hardwicke's words in a case which I have before me at this moment, of the *Attorney-General* v. *Smart*. (1) In that case "An information was brought to have the increasing surplus profits of a charity school, founded by the Crown, applied for the benefit of the master; but the master was not a party thereto. There was a cross bill to have them applied for the benefit of the poor children." In point of fact it was to have a scheme directed. Lord Hardwicke said: "This is a very causeless information, and should be dismissed without any decree, if it was not for the cross bill. The doctrine is true in general that where there is an information, it ought not to be dismissed, but there should be a decree"—what for?—"to establish the charity according to the intent of the donor; but that rule relates to private charities; for where there is a foundation for a perpetual charity by the Crown, it is established as well as it can be already, by a higher authority than this Court." Looking

(1) 1 Ves. Sen. 72.

to the use of the word "established" in that case, and from that time down to the present in connection with schemes, when a charity is established by a scheme, what can be the meaning of these words "scheme legally established" but this, that they mean a scheme for the administration of the charity established by that legal authority which was accustomed to establish schemes down to that time? Before this Act of 1855 was passed, another mode of establishing schemes in the case of small charities, whose incomes did not exceed 30*l.* a year, had been provided by the Act of 1853, and was confided to the Court of Bankruptcy of the district or to the County Court. That, again, was a legal authority, and if the sections of the Act are looked at they will be seen to provide that that legal authority may in the case of such small charities establish schemes. As Stirling J. pointed out, you have all this in the Act of 1853, and in this very Act of 1855 you find the word "scheme" used again and again with reference to a scheme for the administration of the trusts of a charity established by judicial decision, either by the Courts which had power to do it under the Act of 1853, or by the original jurisdiction of the Court of Chancery.

Therefore, the words "scheme legally established," looking to the history of the dealing by the Court of Chancery with charities, and to this legislation, seem to me grammatically to have as plain and clear a meaning as can be. They do not mean the original trust, unless that original trust was a trust founded by the Crown or by Act of Parliament, in which case you might treat it as having been established by higher authority even than the Court of Chancery. In the ordinary case of a charity they mean where the Court of Chancery or the Courts which were empowered by the Act of 1853 to do it, have by a judicial decision established a scheme, which may to some extent modify the original trust, for the future administration of the charity. That is what I should say is the meaning of these words in this clause.

But, then, look at the purpose of the clause. Before this time, charities, even where they had not an express power of sale, had been in the habit in many cases of selling the property

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which belonged to them. The sale might not be good unless it was shewn—and the onus was on the purchaser to shew—that it was for the benefit of the charity that the sale should be made. Then in other cases they had express power to sell by the original instrument of trust, and that was a second case in which trustees of a charity might sell. Again, under the Act of 1853 they might sell, where they had no express power to sell, with the sanction of the Charity Commissioners. Take those three cases, I think they pretty well exhaust the cases in which the trustees of a charity could have sold the charity property, except that of a sale under the Lands Clauses Acts, where they apply. In that case the provisions of those Acts must be followed.

Now with that knowledge the Legislature passed this Act of Parliament containing for the first time an absolute prohibition to all trustees, whether they had got an express power or an implied power, or a power subject to the purchaser being able to shew that it was for the benefit of the charity, or a power to sell with the assent of the Charity Commissioners. This clause comes in and entirely prohibits it, and says, "You shall not sell at all." It is not an enabling clause, it is a negative clause preventing any sale in the future, except under certain conditions. The conditions are: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant otherwise than with the express authority of Parliament"—that is one condition—"under any Act already passed or which may hereafter be passed; or of a court or a judge of competent jurisdiction"—that would be with the authority of the Court of Chancery, or a court of bankruptcy, or a county court, where they had jurisdiction—"or according to a scheme legally established,"—that must be a scheme established by judicial decision,—"or with the approval of the board." If the case comes within any of these exceptions the trustees may sell; but otherwise it is an absolute prohibition. I pointed out in the early part of the argument that this, of course, only applies to trustees who can sell; it cannot be intended to prohibit persons from selling who cannot sell—it only applies to the case where the trustees could sell. Why

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it does not apply to every possible case in which they can sell unless they come within any of these exceptions I confess I cannot for one moment understand. Trustees of charities, as one knows, were very often rather irresponsible, and dealt in a somewhat arbitrary way with the property of charities, particularly small charities (I do not for a moment suggest that anything of that kind has been done here), and it was found necessary, in order to have a complete control over the dealings with charity property, to introduce this negative provision into the Act of Parliament, and to say, "Henceforward you shall not sell your property at all unless you come within one or other of these exceptions"—one of which is with the sanction of the board.

I think the decision of Stirling J. in this case is perfectly right, and that the Act of Parliament applies precisely to this particular case, and that in this case, although the trustees had an express power of sale by their instrument of trust, it was not an instrument of trust founded by Act of Parliament, or by a grant from the Crown, nor had it ever been the subject of a "scheme legally established," and therefore it does not come within any of the exceptions, and the prohibition seems to me to apply.

A. L. Smith L.J. Speaking for myself, I have no doubt that my brother Stirling was right in the construction that he placed upon s. 29 of the Act of 1855. The short point in this case is this, whether or not the words in this section, "according to a scheme legally established," mean, according to the foundation deed of Josiah Mason's Orphanage and Almshouses. It was a charity which he himself founded by deed, having left money and land for that purpose. When the question is asked whether this instrument of foundation is a "scheme legally established" within the meaning of that section, unhesitatingly I say, No. The words are not "established according to a lawful deed," but "according to a scheme legally established." The whole purview of that section is, that trustees of a charity shall not sell, or grant mortgages, or make leases as are therein defined, without some outside authority being brought in as is

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mentioned in that section in order to give its consent. It seems to me that my brother Stirling's judgment on the construction of this section is right from beginning to end, and the appeal ought to be dismissed.

Solicitors: *Burton, Yeates & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham; C. H. Mason.*

W. W. K.

HASSELL *v.* STANLEY.

CHITTY J.

1896

March 13.

Practice—Costs—Set-off—Solicitor's Lien—Independent Proceedings—Rules of the Supreme Court, 1883, *Order* LXV., *rr.* 14, 27, *sub-r.* 21.

Costs incurred in the High Court cannot be set off against costs obtained in the County Court, although the proceedings are between the same parties. Order LXV., r. 14, does not apply to costs in independent proceedings.

MOTION by the defendants to stay execution for costs payable by them to the plaintiff, which raised the question of the right to set off costs incurred, and obtained in independent proceedings between the same parties.

In September, 1895, the plaintiff commenced this action in the Liverpool County Court against the defendants as trustees of the Royal Liver Friendly Society.

In November, 1895, the defendants moved in the matter of the plaint in this action before Chitty J. for a certiorari to remove the action into the Chancery Division of the High Court; and, on November 15, this application was dismissed with costs, which were subsequently taxed at 22*l.*

On December 9, 1895, this action was tried in the county court and dismissed with costs, which were subsequently taxed at 48*l.*

Owing to the death of one of the London taxing masters the costs incurred on the motion for certiorari were not certified in time to enforce payment before the trial of this action in the county court.

The defendants now moved in the matter of the plaint in this action, that execution for the costs ordered to be paid by them to the plaintiff on November 15 might be stayed, until the plaintiff had paid the county court costs to the applicants, or until further order.

Russell Roberts, for the motion. Notwithstanding the lien of the plaintiff's solicitor a set-off may be allowed under Order LXV., r. 14; this kind of case is also provided for by Order LXV.,

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r. 27, sub-r. 21. The costs ordered to be paid by the defendants on the motion were incurred in the matter of the plaint in this action, and in regard to all costs incurred in the same action, the right to set off is sanctioned: *Robarts* v. *Buée* (1); *In re Knapman* (2); *In re Glanvill* (3); *In re Crawshay*. (4) The right to set-off is no longer intercepted by the solicitor's lien. Order LXV., r. 14, applies here, and this set-off should be allowed.

Badcock, for the plaintiff. The motion in the High Court and the action in the county court, though between the same parties, were independent proceedings; the plaintiff had a present right to receive these costs the moment the order of November 15 was made, and the Court will not deprive him of this right: *Automatic Weighing Machine Co.* v. *Combined Weighing and Advertising Machine Co.* (5) Order LXV., r. 14, only applies to costs in the same action, not to costs in different actions and independent proceedings: *Ex parte Griffin* (6); *In re Bassett* (7); *Blakey* v. *Latham* (8); *Edwards* v. *Hope* (9), where the Divisional Court expressly state (10) that Order LXV., r. 14, does not apply to costs in independent actions. Further, if set-off were possible under rule 14, which I deny, there is the lien of the plaintiff's solicitor which intercepts the right to set-off. The defendants make no case for depriving the solicitor of his lien; and in *Edwards* v. *Hope* (9) and *Blakey* v. *Latham* (8) the Court exercised the discretion, which it still has, in favour of the lien.

Russell Roberts, in reply.

CHITTY J. The object of this application is that the defendants may obtain a set-off of the costs they were ordered to pay on the failure of their motion in this Court for a certiorari, against the costs which the plaintiff has been ordered to pay them when his county court action was dismissed.

The defendants, when ordered to pay the costs of the motion

(1) 8 Ch. D. 198.
(2) 18 Ch. D. 300.
(3) 31 Ch. D. 532.
(4) 45 Ch. D. 318.
(5) 37 W. R. 636.
(6) 14 Ch. D. 37.
(7) [1896] 1 Q. B. 219.
(8) 41 Ch. D. 518.
(9) 14 Q. B. D. 922.
(10) Ibid. 924, 925.

before me, did not at the time ask for any order delaying the payment of these costs until the action in the county court had been decided, and my order therefore stands as an order of the High Court that the defendants should pay the amount of these costs when taxed; on that order being made, the plaintiff had a present right to receive these costs, and his solicitor had a lien on them for any costs incurred by him on behalf of his client—a lien which, it is admitted, is for an amount exceeding the sum the defendants were ordered to pay. The costs incurred in the High Court would be taxed by one of the London taxing masters, the costs incurred in the county court would be taxed by the registrar of that court; and therefore these two sets of costs, being taxable under different jurisdictions, it is plain that Order LXV., r. 27, sub-r. 21, has no application to the present case.

Then I come to consider rule 14 of Order LXV., which provides that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought, and the first question is, Does this rule apply to a set-off for costs in distinct and independent actions and proceedings? The Divisional Court in *Edwards* v. *Hope* (1) have held that it does not apply; and then the Court went on to exercise its discretion in favour of the solicitor's lien; and in the same case on appeal the Lords Justices, though they did not go into the question whether rule 14 did or did not apply to the case before them, declined to interfere with the discretion that had been exercised in favour of the solicitor by the courts below, and approved of the manner in which that discretion had been exercised: that case has been followed by Kay L.J. (then Kay J.) in *Blakey* v. *Latham*. (2) I am not bound to express an opinion whether rule 14 does or does not apply to a case where costs have been incurred in the High Court, and costs have been obtained in the county court between the same parties in distinct and independent proceedings, though I may say in passing that if the opinion expressed by the Divisional Court in *Edwards* v. *Hope* (1) is right, it would seem that rule 14 does not apply to the present case. I decline, however, to express any final opinion now on

(1) 14 Q. B. D. 922. (2) 41 Ch. D. 518.

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this point, because it is not necessary for me to do so, if I decide this case, as I propose to do, on the question of discretion, and because, in a sense, there is some connection between the action in the county court and the motion for certiorari to remove it to the High Court.

Whether rule 14 does or does not apply to this case, I think it is clear on the authorities that I have a discretion to decide whether or not I shall interfere with the lien of the plaintiff's solicitor. I have asked the defendants to state any reasons why I should exercise this discretion adversely to the solicitor's lien, and no sufficient reasons have been given for depriving the solicitor of his lien. As far as I can see, he has fairly earned the money in respect of which the lien arises, and I do not think I ought to take away from him that which he has justly earned. For this reason I refuse the present application, and with costs.

Russell Roberts then applied for leave to set off these costs against the costs obtained in the county court.

CHITTY J. As the question I have just refrained from deciding is now directly raised again, I am not going to avoid giving my decision on the point by sheltering myself under my judicial discretion; and I therefore say that, in my opinion, the principle adopted by the Divisional Court in *Edwards* v. *Hope* (1) and by Kay J. in *Blakey* v. *Latham* (2) applies to this case, and I therefore decline to make any order for a set-off of the costs of this motion against the costs obtained by the defendants in the county court.

Solicitors: *Rowcliffes, Rawle & Co., for Bremner, Sons, & Corlett, Liverpool; Crowders & Vizard, for Clarke & Davis, Liverpool.*

(1) 14 Q. B. D. 922. (2) 41 Ch. D. 518.

W. C. D.

DENNISON *v.* JEFFS.

NORTH J.

1896

Feb. 28, 29; *March* 3, 4.

[1895 D. 262.]

Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-s.* 3; 38, 39—*Secretary of State's Regulations*, 1884, *rr.* 13, 14—*Instrument of Dissolution—Signature—Agent—Infant—Joint Shareholder.*

The signature of a member of a building society to one only of the two duplicate instruments of dissolution is inoperative.

An infant member of a building society can consent to dissolution of the society: and the consent of a principal to such a dissolution may be signed by an agent on his behalf.

For the purpose of consenting to dissolution of a building society joint holders of a share are to be considered one member, and must all sign the instrument of dissolution.

A member of a building society who holds shares both jointly and severally need not sign the instrument of dissolution in more than one place to testify consent in respect of all his shares.

THE plaintiff in this action was a married woman suing in respect of her separate estate and on behalf of herself and all other members of the 2nd Watford 924th Starr-Bowkett Building Society (hereafter called "the society") except the defendants. The defendants were three persons (nominated in an instrument of dissolution of the society as trustees for the purpose of the dissolution and winding up of the society), and the society. The plaintiff was an advanced member of the society. Among other things she claimed a declaration that the instrument of dissolution was void, and consequential injunctions to restrain the defendant trustees from further intermeddling with the assets of the society, and from selling the property comprised in her mortgage to the society.

The ground on which the plaintiff sought to impeach the instrument of dissolution was that the consent of the statutory majority of three-fourths of the members, testified by their signatures to the instrument of dissolution, had not been obtained. (1)

(1) The Building Societies Act, 1874, provides:—

Sect. 32: "A society under this Act may terminate or be dissolved:

* * * *

"(3.) By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the

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The instrument of dissolution was dated April 20, 1894. It was drawn in duplicate in accordance with the Secretary of State's rules made under the Act of 1874. Each part purported to be signed by 115 members, the total number of members being, on the supposition that the joint holders of a share were to be treated as one member, 151. Both parts of the instrument were forwarded to the Registrar of Building Societies. The registrar retained one, and returned the other to the society, with a certificate of registration on it, dated July 4, 1894. The following are the facts bearing on the question whether the requisite number of consents duly testified had been given to the instrument of dissolution. One member, a Mrs. Franklin, whose name appeared as a signatory, had not signed herself; but her husband, in her presence and by her authority, had written her name. Certain of the signatories were infants. Some of the shares were held by two persons. It had been the practice of the society to treat joint holders as one member, and to allow one holder to act for both; the signature of only one of two joint holders was attached to the

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instrument of dissolution. The instrument of dissolution shall set forth—

* * * *

"(*e*) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration.

"Alterations in the instrument of dissolution may be made with the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules, and shall be binding upon all the members of the society."

* * * *

Sect. 38: "Any person under the age of twenty-one years may be admitted as a member of any society under this Act, the rules of which do not prohibit such admission, and may give all necessary acquittances; but during his nonage he shall not be competent to vote or hold any office in the society."

Sect. 39: "Two or more persons may jointly hold a share or shares in any society under this Act; and all shares held jointly by any two or more persons in any society subsisting at the time appointed for the commencement of this Act, the rules whereof shall not prohibit such joint holding, shall be deemed to be lawfully so held."

The only provision in the rules of this society relating to infant members was contained in the 3rd rule entitled, "Qualification and evidence of membership, change of residence, &c." "A minor may take shares, and may transfer the same as per rule 15, but cannot hold office, vote, nor act as substitute for any officer." There was no rule referring to joint holders.

instrument of dissolution in respect of all shares held jointly. In some cases the joint holder of a share, whose co-holder had signed in respect of that share, had signed the instrument of dissolution in another place in respect of shares he held severally. There were five cases in which one joint holder had signed and the other joint holder had not signed the instrument at all.

The writ was issued on February 13, 1895. After that date seventeen persons who had not previously signed added their names to that copy of the instrument of dissolution which had been returned by the Registrar of Building Societies, but did not sign the part retained by the registrar.

Swinfen Eady, Q.C., and *MacSwinney*, for the plaintiff. A minor who holds shares has no power to vote or hold office: that is expressly provided by the Act; that is to say, he cannot take part in the management of the affairs of the society. It follows that he cannot give the required consent to the dissolution of the society—an act of much more importance than the taking part in the ordinary business of the society. We submit, therefore, that the instrument of dissolution is void; because if the names of infants who have signed are struck out, the necessary majority of members have not duly consented.

In the next place, the consent of Mrs. Franklin has not been duly testified by her signature, for that signature cannot be given by an agent for this purpose: that construction has been put on this Act in the Scottish Court of Session: *Second Edinburgh and Leith 493rd Starr-Bowkett Building Society* v. *Aitken.* (1)

Where there are joint holders of a share, they together constitute a member within the meaning of s. 39 of the Building Societies Act, 1874, and the signature of all of them is necessary as testifying their consent. For this reason the instrument of dissolution is void, even if it could be said that a member, who has testified his assent in respect of shares he holds severally, has thereby also consented as a joint holder.

(1) 19 Court Sess. Cas. 4th Series, 603.

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But, we submit, his signature must also be given separately in respect of each set of shares.

It is sought by the defendants to make good the defect of the instrument by means of signatures attached to the duplicate part of the instrument of dissolution after that part was returned by the registrar. That duplicate part is not by itself the instrument of dissolution, and the attachment of signatures to it after registration can have no effect on the validity of the instrument.

Vernon Smith, Q.C., and *Dunham*, for the defendants. According to a well-known principle of English law a person authorized by parol can sign the name of another. Scottish cases on the subject have no authority in this Court. One case very analogous is *In re Whitley Partners* (1), where a memorandum of association was signed by an agent for his principal.

In the next place, there is no reason, in the absence of provision to the contrary in the Acts relating to building societies and in the rules of this society, why an infant member cannot consent to an instrument of dissolution: doing so is not voting or holding office; nothing else is prohibited. An infant may by a next friend present a winding-up petition, and it has been held that an infant may sign a memorandum of association as one of the seven persons necessary to incorporate a company: *In re Nassau Phosphate Co.* (2) Every member must be counted either as consenting or as non-consenting in ascertaining whether the requisite majority has consented to an instrument; if infants could not consent and there were several infant members, it might lead to the absurd result that no instrument of dissolution could be made valid though all the members desired a dissolution.

As to the cases of joint holders, we submit in the first place that one joint holder can act for all in signing the instrument. At any rate, in those cases where a joint holder has also an entire share and has signed in respect of that share he is to be considered as having also jointly consented with his co-owner of any other share who has signed.

If the instrument had not received the requisite consents, owing to the mistaken view taken of the position of joint holders,

(1) 32 Ch. D. 337. (2) 2 Ch. D. 610.

that defect was cured by the signatures of members attached to the duplicate part in the hands of the trustees. It may be that the amended instrument ought to be registered and the trustees have rendered themselves liable to penalties for not having registered it; but registration is not a condition precedent to the validity of the instrument.

MacSwinney, in reply.

NORTH J. [After stating the facts, and referring to s. 32 of the Building Societies Act, 1874:—] In the present case there have been four grounds suggested upon which it is contended that the instrument of dissolution was not signed by the proper proportion of members. The first objection is that some of the members who signed a consent did so only in respect of some of the shares which they held, and that being so, it is said they did not sign a consent in respect to the other shares, and the number is to be reduced accordingly. The number of 115 has been calculated upon the footing that every member who has signed a consent did so with respect to all his shares; and in my opinion that is the true effect of the signatures. I do not know how a member can give a half consent and not an entire consent. We are not embarrassed with the case of a person who has signed with respect to some of his shares and has refused his consent as to the rest. We have the simple fact, testified by their signatures, of consent to the dissolution. In my opinion the members who consent by signing generally are not limiting their consent to any particular shares; and therefore that point I decide in favour of the defendants.

The second point raised is as to Mrs. Franklin. She did not sign the deed herself, but her name appears in the proper place. There can be no question about her consenting in fact, but her signature was written by her husband. It is her own name he has signed; it was signed by him in her presence, at her request, and by her authority, and the question is whether that is sufficient or not. The plaintiffs relied upon a case which was decided in the Scottish Court of Session (*Second Edinburgh and Leith* 493*rd Starr-Bowkett Building Society* v. *Aitken* (1)).

(1) 19 Court Sess. Cas. 4th Series, 603.

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That, of course, is no authority here; but it is a decision by a Scottish Court putting their construction on the same Act of Parliament that I have to deal with, and deciding the point I have before me; and if there was nothing before me except that case I should simply defer to the opinion of persons who are quite as likely to be right as I am. It was a case in which four judges—one in the court of first instance and three in the superior court—all took the view that an agent could not sign.

But there are certain English cases looking the other way. There was the case in the Court of Appeal, *In re Whitley Partners* (1), in which it was held that the signature to a memorandum of association need not be written by the signatory himself, but could be written by an agent on his behalf. It is true that the document signed was not an instrument of dissolution; but I can see no distinction in principle between the two cases. I had also to consider a similar case under the Bills of Sale Act in *Furnivall* v. *Hudson* (2), and I thought it clear that a person could execute a bill of sale by attorney. In this case, if I had to decide this question, I should follow the decision of the Court of Appeal; but the point is not really material, because there are signatures of 115 members; and if Mrs. Franklin's signature be taken away there remain, assuming all the other assents to be duly attested, sufficient assents to make the instrument valid.

The next point is this: there are several cases in which the consent was signed by persons who were infants. As to that, it is necessary to consider what the position of these persons is, to see if they are competent to sign. The 38th section of the Act says that any person under the age of twenty-one may be admitted a member unless the rules of the society specially prohibit it. He shall not vote, however, or hold any office in the society. One would have expected in a clause like that to have some explanation given as to what the position of an infant might be; but nothing further is contained in the Act as to that. Then we turn to the rules. This is clearly a case in which the rules of the society do not prohibit such an admission: therefore minors may be members. The third rule says

(1) 32 Ch. D. 337. (2) [1893] 1 Ch. 335.

expressly that a minor may take shares and may transfer the same; but cannot hold office, vote, or act as substitute for any officer. That provision follows the Act, except that there is an addition—if it is an addition—that an infant cannot act as substitute for an officer. That seems to me, subject to a remark I have to make on another rule, the only qualification imposed on an infant member. What, then, is the position of an infant? He may do a good many things. Among other things, as decided in the case of *In re Nassau Phosphate Co.* (1), he may sign the memorandum and articles of association of a company as one of the first seven subscribers. Then, again, he may be a contributory, and as such he may present a winding-up petition; doing so as an infant, of course he can only act by a next friend who is responsible for costs. Still, such a petition would not be the next friend's petition, but the infant's own petition. It is true that on the winding up of a benefit building society under this Act, a petition for winding-up can only be brought with the consent of three-fourths of the members; but if that consent is obtained, an infant member may petition as any other member may. I mention that because it is argued that it is a strong thing to say that an infant who cannot vote in the ordinary management of a society can effectually consent as a member to the dissolution of the society. It is clear from what I have said that he can act in getting the dissolution in another way, and I do not feel that that causes any difficulty. [His Lordship referred to several rules of the society relating to withdrawals, appropriations for priority of advances, and matters to be proposed at meetings, as shewing that members who were under age were not apparently excluded from the privileges and obligations of adult members other than in the cases expressly provided for of voting, holding office, and acting as substitutes for officers, and in one other particular case at a general meeting; and proceeded :—]

The only question, then, is, can the giving a consent to an instrument of dissolution be considered to be voting within the meaning of the Act and rules? I do not think it is: no voting takes place in the ordinary sense; and if it had been intended

(1) 2 Ch. D. 610.

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that an infant was to be precluded from consenting to an instrument of dissolution one would have expected to find some express provision to that effect either in the statute or the rules of the society.

The fourth objection is based upon the fact that there are five cases where a share was held by two persons, one of whom only signed the instrument of dissolution.

The holding of a share by two or more persons is provided for by s. 39 of the Act of 1874 in a building society the rules whereof do not prohibit such joint holding. I can find nothing else in the Act pointing to the existence of more holders of a share than one; though many difficulties are suggested by other sections, for instance, whether if there are six joint holders they are to be considered one member or six; and it might be expected that the Act itself would throw some light on the position of joint holders of shares. It may be that the 39th section was introduced at a later date, and is an interpolation that does not fit in with the other provisions; or it may be that it was thought undesirable for the Legislature to deal further with the matter, leaving it to the framers of the rules to make proper provisions to meet such difficulties, and to say what the position of joint holders should be. If that was the intention, it is not given effect to by the rules of this society, for I find nothing in terms in any rule relating to joint holders. Some rules seem to point one way, some the other. [His Lordship referred to various rules of the society which raised a difficulty in treating each joint holder of a share as a separate member for the purpose of such several rules, and continued :—]

I come, therefore, to the conclusion that joint holders of a share are to be considered as one member for the purpose of consenting to an instrument of dissolution, and such consent must be attested by the signatures of all of them. I do not see how the consent of one joint holder of a share can operate as a consent of the other joint holders. It has been suggested that he may act as agent for the other holders. I think he may, if he signs in a proper way, and he is really acting as agent. There is not here the slightest indication or evidence of such agency. It seems to me, therefore, that the original instru-

ment of dissolution was not valid because, apart from the five joint members who, I hold, have not given the statutory consent, a three-fourths majority has not consented.

Then the defendants raise another point. It was said, assuming the instrument to be originally invalid, this has been cured by what has taken place since. I am sorry to say I do not see my way to uphold the instrument of dissolution by reason of the signatures that have been subsequently put to the duplicate. It appears that seventeen new signatures have been added; and it was admitted that, although certain persons who originally signed had since ceased to be members, yet if these seventeen added signatures could be counted the new instrument would be sufficiently signed in point of numbers; if the part to which the additional signatures have been attached can be considered a complete new instrument. The question is whether these new signatures are effective. I do not think there is any other instrument of dissolution than that which has been registered. If that was to be altered in any way it might be altered under s. 32 by the same proceeding as the Act requires with respect to the original instrument; but it does not appear that anything of that sort has actually taken place. Then as regards the instrument itself. The Act says the instrument of dissolution shall be registered, and shall be binding upon the members of the society. It was said that the provision for registration did not make registration a condition precedent. It can, however, only be binding upon the members if it is an instrument complete and capable of being registered. How does it stand at present? Originally the instrument was perfectly regular in that respect—it was prepared in duplicate and was registered in the manner provided by the Secretary of State's regulations. One of these duplicate parts was sent back to the trustees, and has had the additional signatures placed on it. That is a document which cannot be registered at present because the parties are not in a position to do so. It is not executed in duplicate. As regards the fresh signatures they appear on one duplicate part of the instrument only, and there is no other instrument upon which they appear. It is not an instrument of dissolution which the

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society is capable of registering at the present time and in the present form. In my opinion they cannot register it at all now. The trustees, who seem to me to have acted very fairly and properly in the matter, subject only to the mistake of having acted on an instrument which has not been properly executed, would find themselves in a very difficult position if I were to hold that the instrument was effective, because they would have laid themselves open to serious penalties under the Act of 1894 for not registering within the proper time. In my opinion, however, they are free from any such penalties, because the instrument is one that is not capable of being registered by them as it now stands. I do not say there is anything to prevent the society from appealing to its present members and proceeding to pass and approve a new instrument of dissolution, if they can get the proper consents to it. But the existing instrument in my opinion is not valid.

Solicitors: *T. A. Dennison & Co.*; *George Reader & Co., for Broad & Riggall, Watford.*

D. P.

NORTH J. 1896 *March* 12.

In re GRAY. GRAY *v.* GRAY.

[1895. G. 2122.]

Revenue—Estate Duty—Apportionment—Debt due on Covenant in Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6, 7, 8, 9, 14.

A father upon the marriage of his son covenanted with the trustees of the son's settlement that his executors or administrators should, within six months after his death, pay to the trustees the sum of 25,000*l.*, to be held by them upon the trusts of the settlement. The father by his will devised and bequeathed to his trustees (who were also his executors) the residue of his real and personal estate, in trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts and legacies, and to hold the residue upon certain trusts. After the father's death his executors paid the estate duty upon the value of his estate after deducting his funeral and testamentary expenses and his debts, other than the debt of 25,000*l.*

Held, that the estate duty in respect of the 25,000*l.* must, as between the executors and the trustees of the settlement, be borne by the former.

SUMMONS by the trustees and executors of the will of William Gray, who died on February 6, 1895, as plaintiffs, against the

trustees of a settlement, dated April 22, 1891, made in contemplation of the marriage of J. R. Gray, the son of the testator, and H. H. Gray, one of the residuary legatees under the will, as defendants, asking for the determination of the question whether a sum of 25,000*l.*, which the testator had covenanted to pay to the trustees of the settlement within six months after his death, ought to bear a rateable proportion of the estate duty paid in respect of the testator's estate, or whether the whole of the estate duty so paid ought to be borne by the testator's residuary estate.

The settlement contained a covenant by the testator with the trustees that, in case the then intended marriage should take place, the executors or administrators of the testator should, within six months after his death, pay to the trustees for the time being the sum of 25,000*l.*, which was to be held by them upon the trusts of the settlement. The testator also covenanted with the trustees that, in case the intended marriage should be solemnized, he, or his executors or administrators, would, during his life and thereafter until the 25,000*l.* should have been fully paid and satisfied, pay to the trustees during the life of J. R. Gray the annual sum of 1000*l.*, commencing from the marriage, to be applied for his benefit.

The marriage took place, and when this summons was heard J. R. Gray and his wife were both living.

By his will, dated February 12, 1891, the testator appointed the plaintiffs executors and trustees thereof. And, after making some specific and pecuniary bequests and a specific devise, he devised and bequeathed the residue of his real and personal estate unto and to the use of his trustees, their heirs, executors and administrators, in trust for sale and conversion, and out of the proceeds thereof to pay his funeral and testamentary expenses, debts, and legacies, and to hold the residue upon the trusts therein declared.

The value of the testator's estate for the purpose of estate duty was 123,130*l.* The sum of 7418*l.* was paid by the executors to the Commissioners of Inland Revenue for estate duty.

The proceeds of sale of the real estate (which were included

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in the above value) amounted to about 30,000*l.* In arriving at the above value the testator's debts were deducted, other than the 25,000*l.* due under the covenant.

Vernon Smith, Q.C., and *Marcy*, for the plaintiffs. The executors are no doubt accountable to the Crown for the payment of the estate duty; but, as between them and the trustees of the settlement, the duty ought to be apportioned rateably, according to the values of the residue and the 25,000*l.* respectively. (1)

(1) The following are the material sections of the Finance Act, 1894:—

Sect. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say (inter alia):

"(*a.*) Property of which the deceased was at the time of his death competent to dispose."

Sect. 6: "(2.) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Sect. 7: "(1.) In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—

"(*a.*) For debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Sect. 8: "(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but

So far as the real estate is concerned it did not pass to the executors as such, but by virtue of the devise on trust for sale. The testator's debts are in effect charged on both his real and personal estate, and the executors, having paid the estate duty upon the aggregate sum, are entitled to deduct the rateable part of the duty from the 25,000*l.* which is to be paid to the trustees of the settlement, who have the benefit of the charge.

[NORTH J. Under s. 14, sub-s. 1, the executors would at any rate be entitled to recover from the trustees of the settlement the estate duty upon so much only of the 25,000*l.* as is attributable to the proceeds of the sale of the real estate.]

That is admitted.

The estate duty is a substitute for succession duty, and

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for his own neglect or default have received.

"(4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Sect. 9: "(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

"(4.) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned."

Sect. 14: "(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary."

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under the Succession Duty Act of 1853 (16 & 17 Vict. c. 51), there would have been upon the death of the testator a "succession" to the 25,000*l.*, and succession duty would have been payable by the trustees of the settlement in respect of that sum, subject to an allowance, under s. 38 of that Act, for the value of the annuity of 1000*l.* lost by J. R. Gray upon the succession taking place: *Attorney-General* v. *Montefiore* (1); *In re Higgins*. (2)

For financial purposes the 25,000*l.* should be treated as a fund settled by the testator, not as a debt due by him. In *In re Croft* (3), account duty was apportioned. [He referred also to *In re Countess of Orford*. (4)]

Swinfen Eady, Q.C., and *Bryan Farrer*, for the trustees of the settlement; and *A. R. Kirby*, for the defendant residuary legatee, were not called upon.

NORTH J. In my opinion the trustees of the settlement are creditors of the testator's estate for 25,000*l.*, and are entitled to have that sum paid to them free from any deduction in respect of estate duty. It is quite clear that the Crown was entitled to estate duty upon the whole of the testator's estate, including the 25,000*l.*, and that duty has been rightly paid by the executors in the first instance. If any question had arisen between persons respectively entitled to the testator's real and personal estate as to the way in which the estate duty ought to be borne as between them, there might have been some ground for the argument that the duty ought to be apportioned between those two classes according to the amounts of their respective interests. But no such question can arise in the present case, because the same persons are entitled to both the real and the personal estate. It seems to me that the trustees of the settlement are simply creditors of the testator, and they are in this fortunate position (the only instance, so far as I know, of any one being in a fortunate position under this Act), that they escape from the liability to succession duty under the Succession Duty Act, and are not liable to estate duty under the Finance Act, 1894.

(1) 21 Q. B. D. 461.
(2) 31 Ch. D. 142.
(3) [1892] 1 Ch. 652.
(4) Ante, p. 257.

I think that the sections of the latter Act which have been referred to settle the matter which is now in dispute. Sect. 1 imposes a duty called "estate duty," differing in some respects from the previously existing duties, and being in some cases a substitute for those duties, upon all property passing on the death of every person dying after August 1, 1894. By s. 2 all the real and personal property of the deceased is to be deemed to be "property passing on his death," though other property is also included under that term. Sect. 6 provides, by sub-s. 2, that the executor of the deceased "shall pay the estate duty in respect of all personal property of which the deceased was competent to dispose at his death," and "may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor." In the present case all the real and personal property of the testator was the subject of a general devise and bequest to the trustees and executors upon trust for sale and conversion, and to pay debts. No doubt this 25,000*l.* is a debt due from the testator's estate to the trustees of his son's marriage settlement. The executors were bound therefore to pay the estate duty upon the personal estate, and they were authorized by sub-s. 2 of s. 6 to pay the duty upon the proceeds of the real estate, and this they have done. Then s. 7 provides that in determining the value of an estate for the purpose of estate duty an allowance shall be made for funeral expenses, debts and incumbrances; but that no allowance shall be made for debts incurred by the deceased "unless such debts were incurred bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit." This debt of 25,000*l.* upon the testator's covenant with the trustees of the settlement was one in respect of which he did not receive any consideration in money or money's worth, and it was not incurred in any way for his own use and benefit. The debt was, no doubt, created for full consideration, but not a consideration in money or money's worth, and, therefore, it is a debt for which no allowance is to be made in determining the value of the testator's estate for the purpose of estate duty, though in general such an allowance must be made for debts.

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Estate duty must, therefore, be paid upon the amount of this debt, and the only question is, upon whom the burden of the payment ought to fall—upon the trustees of the settlement or upon the residue of the testator's estate. Sect. 8 provides by sub-s. 3 that the executor of the deceased shall be accountable "for the estate duty in respect of all personal property of which the deceased was competent to dispose at his death"; and, by sub-s. 4, that, where the executor is not accountable for the estate duty in respect of property passing on the death of the deceased, "every person to whom any property so passes for any beneficial interest in possession, and every trustee in whom any interest in the property so passing or the management thereof is at any time vested . . . . shall be accountable for the estate duty on the property." By sub-s. 1 of s. 9 "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable," and by sub-s. 4, "if the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property." That is to say, as between the persons who take under the will different parts of the estate of the deceased, where what the Act defines as the rateable part of the duty has been paid by the executor, it is to be repaid to him, and the estate duty is to be apportioned according to the value of the respective interests. And where the executor is not accountable for the duty, because the property does not pass to him and is not under his control, the duty is to be a first charge on the property itself. But this provision applies as between persons who are beneficially interested in the estate, and it has no application to a creditor who has a claim against every part of the estate. Then comes sub-s. 1 of s. 14, which provides that "in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property under a disposition not containing

any express provision to the contrary." Under this sub-section, no doubt, if, after the estate duty had been paid, any question arose between the persons entitled to the personal estate and the persons entitled to the real estate by reason of the testator's debts having been charged on both his real and his personal estate, it may well be that the persons beneficially interested in the personal estate would be entitled to say that a proportionate part of the duty ought to be borne by the real estate. But that question does not arise in the present case, because the proceeds of both the real and the personal estate are given as a mixed fund to the same persons. It seems to me, therefore, that this debt of 25,000*l.* is one which cannot be excluded in determining the value of the testator's estate for the purpose of estate duty; but that no part of the duty can be thrown upon the persons who are entitled to the debt, and the duty must be borne by the testator's estate.

I do not see how any analogy can be drawn from the Succession Duty Act; the question must turn entirely upon the construction of the Finance Act. But it is singular that in this particular case no succession duty would have been payable under the Succession Duty Act, inasmuch as under s. 38 of that Act the testator's son would have been entitled to claim in respect of the value of the annuity of 1000*l.*, of which he was deprived by the testator's death, an allowance which would at any rate be equal to the assessable value of the 25,000*l.* I decide the question simply upon the construction of the Finance Act, 1894.

Solicitors: *Tucker, Lake & Lyon*; *Gosling & Co.*

W. L. C.

NORTH J.
1896
March 21.

In re TOTTENHAM.
TOTTENHAM *v.* TOTTENHAM.

[1895 T. 1928.]

Practice—Administration Action—Plaintiff in representative Capacity—Action on behalf of all Creditors—Title of Action—Rules of Supreme Court, 1883, *Order* III., *r.* 4.

If the writ in a creditor's action for the administration of real and personal estate does not shew that the plaintiff is suing on behalf of all the other creditors of the deceased, this fact ought to appear in the title of the statement of claim, and not merely in the body thereof.

Eyre v. *Cox* (24 W. R. 317) explained.

MOTION FOR JUDGMENT.

The plaintiff was the sole trustee of a settlement dated February 9, 1887. One of the defendants was the executor of Sarah Anne Loftus Tottenham, widow.

By the claim at the end of the statement of claim the plaintiff, who alleged that he was a creditor of the testatrix in respect of a breach of trust, claimed certain declarations; an account of what was due from the estate of the testatrix on the footing of those declarations; and payment by the defendant executor to the plaintiff as such trustee of the sum found due; and, in the event of the defendant executor not admitting assets, the plaintiff, "suing on behalf of himself and all other creditors" of the testatrix, claimed administration of her real and personal estate.

The writ and the statement of claim were respectively entitled "In the matter of the estate of Sarah Anne Loftus Tottenham, deceased"; but neither the title of the writ nor the indorsement nor the title of the statement of claim shewed that the plaintiff was suing on behalf of the other creditors. The only way in which it appeared that he was so suing was by the above-quoted paragraph in the claim at the end of the statement of claim.

C. C. Tucker, for the plaintiff. The writ does not shew that the plaintiff is suing in a representative character on behalf of

all the creditors of the testatrix; but this appears in the statement of claim, and that is a sufficient compliance with the Rules of the Supreme Court, Order III., r. 4: *Eyre* v. *Cox*. (1)

Beddall, for the defendants.

NORTH J. Having regard to the judgment of Jessel M.R. in *Eyre* v. *Cox* (1), I think it must have been stated in the title of the statement of claim in that case that the plaintiff was suing on behalf of all the other creditors. The action was by a creditor for administration of real and personal estate, and the Master of the Rolls is reported to have said: "where it appeared on the statement of claim that the plaintiff in such an action was suing on behalf of himself and all other creditors it was not necessary to amend the writ by the insertion of those words. The writ, however, as well as the statement of claim, ought to be intituled, according to the forms of statement in Appendix C, in the matter of the estate; for the object of that heading was that the register should shew what estates were affected by actions for administration." I think that the reference there to the action being entitled "in the matter of the estate" in question shews that the matter with which the Master of the Rolls was dealing was the title of the action, and that the reason why he considered it unnecessary that the writ should be amended was, because the title of the statement of claim shewed that the plaintiff was suing in a representative character. A statement buried somewhere in the statement of claim, that the plaintiff is suing on behalf of all the creditors of the testatrix, would be of no use. The statement ought to appear in the title of the action, and then it will appear throughout that the action is a creditor's action. I give leave to amend the statement of claim by adding to the title a statement that the plaintiff is suing on behalf of all the other creditors.

Solicitors: *J. Harwood; H. D. Booth.*

(1) 24 W. R. 317.

W. L. C.

STIRLING J.
1896
Jan. 21, 22;
March 7.

In re SAMPSON.
SAMPSON *v.* SAMPSON.

[1895 S. 2272.]

Will — Trust—Life Interest — Provision against Alienation — Attachment of Income by Judgment Creditor of Tenant for Life—Garnishee Order.

A testator gave his real and personal estate to trustees upon trust to pay to his son so much of the income accruing due during his lifetime "as would not, although the same was payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the same income as would, if the same were payable to my said son, be disposed of as last aforesaid" for the benefit of his son's wife and children at the discretion of the trustees. On April 16, 1895, the trustees had in their hands a sum representing income due and payable to the son. On April 17 they were served by creditors of the son with a garnishee order attaching the money in their hands, and in pursuance thereof they paid over the money to the creditors. On an application by the son's wife to recover it from the trustees:—

Held, that the trusts of the income during the son's life were valid in law; that the time at which the destination of any instalment of income was to be determined was the moment at which that instalment either became due or was in the hands of the trustees ready for application under the trusts of the will; that the son's title to the money accrued on April 16, 1895, and that the plaintiff consequently never became entitled to the benefit of the discretionary trust in her favour.

Adjourned Summons.

This was a summons by Anne Maria Sampson, the wife of William Henry Sampson, asking that the trustees of the will of Stephen Sampson might be ordered to pay to her on her separate receipt the sum of 132*l.* 7*s.* 5*d.*, admitted to have been received by them in respect of rents and income of the real and residuary personal estate of the said testator, and payable, in the events which had happened, to her.

The testator by his will dated December 4, 1879, devised all his real estate and bequeathed the residue of his personal estate to his trustees upon trust for sale and conversion, and directed his trustees to invest the proceeds of sale, and out of the income of the said net proceeds and the investments thereof to raise during the joint lives of his wife and son William Henry

Sampson an annuity of 100*l.*, and apply the same as hereinafter directed, and subject thereto to pay the income of his trust property to his wife for life for her separate use and without power of anticipation, and after her death to apply the income of his trust property accruing due in the lifetime of his said son in accordance with the trusts thereinafter expressed concerning the same; and subject as aforesaid as to both the capital and income of his trust property in trust for the children of his said son. The will continued as follows: "I direct that my trustees shall stand possessed of the said annuity of 100*l.* hereinbefore directed to be raised during the joint lives of my said wife and son, and of the income of my trust property accruing after the death of my said wife and during the lifetime of my said son [Upon trust to pay to my said son so much of the same annuity and income as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the same annuity and income as would, if the same were payable to my said son, be disposed of as last aforesaid for the benefit of his wife and children and other issue for the time being in existence, or some one or more of those objects if any, or if none for the benefit of the person or persons, or some one or more of the persons for the time being entitled or presumptively or expectantly entitled to the income of my trust property in such proportions, at such times, and in such manner as my trustees shall in their discretion think fit."] (1)

The testator died on September 24, 1881, and his widow on April 17, 1894.

On April 16, 1895, the trustees' solicitors wrote to Mr. W. H. Sampson as follows: "Enclosed we beg to send you statement of account shewing the transactions of the trust since the last accounts were delivered to you.

"The balance of income payable to you is according to the accounts 132*l.* 7*s.* 5*d.*, and we have our clients' cheque for this amount. Please say if the account is correct."

(1) The clause between brackets appears to have been taken from Hayes and Jarman's Concise Forms of Wills, 9th ed. 278.

STIRLING J. 1896 *In re* SAMPSON. SAMPSON *v.* SAMPSON.

On April 17 Mr. W. H. Sampson telegraphed in reply, "Account received is correct forward cheque per return post." On the same day the trustees were served by judgment creditors of Mr. W. H. Sampson with a garnishee order nisi attaching the money due to him in their hands, and the solicitors accordingly wrote to him as follows:—

"We are in receipt of your telegram. We are unable to comply with your request inasmuch as your father's trustees have to-day been served with an order attaching the money due to you on behalf of the late Mr. Alfred Chadburn's trustees.

"Unless therefore some arrangement is made with Mr. Chadburn's trustees it will be the duty of your father's trustees to pay over the income in hand pursuant to the attachment order."

The garnishee order nisi was made absolute on April 24, and the trustees having paid the 132*l.* 7*s.* 5*d.* to the judgment creditors Mrs. Sampson took out this summons. Mr. and Mrs. Sampson had no children.

Hastings, Q.C., and *Marcy*, for the plaintiff. Upon the service of the garnishee order on the trustees the discretionary trust for the wife took effect. The order created a charge which prevented the money being personally enjoyed by the debtor: *Hamer* v. *Giles* (1); *Ex parte Whitehouse* (2); *Webb* v. *Stenton*. (3) The principle established by *Hood Barrs* v. *Cathcart* (4) and *Loftus* v. *Heriot* (5) applies by analogy to this case, because the testator by the clause seeks to restrain the son from anticipating the income.

[STIRLING J. The Court will not invent a restraint upon anticipation for men or unmarried women.]

The intention was to ensure that the income should not be paid to or received by the son unless it would be personally enjoyed by him. Unless the son could predicate that there was nothing to prevent his personally enjoying the income he could not demand payment from the trustees, and consequently there

(1) 11 Ch. D. 942.
(2) 32 Ch. D. 512.
(3) 11 Q. B. D. 518.
(4) [1894] 2 Q. B. 559.
(5) [1895] 2 Q. B. 212.

was no debt due from them to him. So long as the judgment subsisted the income could not properly be paid over by the trustees to the son; it was not really his property, and could not therefore be attached. The trustees ought to have taken steps to bring the claim of the wife before the Court, as they might have done under Order XLV., r. 5: *Roberts* v. *Death*. (1)

This is a discretionary trust for a prodigal, and there is nothing repugnant to the law in such a clause.

There is no question of defrauding creditors. The clause does not offend against the law either in letter or spirit.

Buckley, Q.C., and *E. Beaumont*, for the trustees. A man cannot be restrained from anticipation. A debtor may personally enjoy money by paying his debts. It is said that the son could not personally enjoy the income unless it actually reached his hands. But suppose it had come to his hands and then been attached, could the trustees be called upon to refund it to the wife? The clause is clearly a restraint upon anticipation. Suppose the son had discounted an instalment of income by selling it before it was due, could the trustees refuse to pay over the money to him when it became due? Cases like *Hood Barrs* v. *Cathcart* (2) have no application.

The effect of the letter of April 16 and Mr. Sampson's telegram approving the statement of account was to make the money in the hands of the trustees a debt due from them to him for which he could have sued them. The cases as to married women have no application. The money belonged to the son, and was perfectly capable of being attached in the hands of the trustees. Future instalments of income are not affected, and the gift over has not come into operation.

Marcy, in reply. Although the doctrine of restraint upon anticipation is not strictly applicable to the case of a man, yet the same result may be attained in a different manner: Davidson's Precedents, 2nd ed., vol. iii., p. 93.

[STIRLING J. Is not this an attempt to give the son a personal right of enjoyment notwithstanding alienation?]

If it be so, the object is not unlawful. The gist of the clause is that the trustees are to pay to the son so much of the property

(1) 8 Q. B. D. 319. (2) [1894] 2 Q. B. 559.

STIRLING J. as is not in danger from creditors; and the rest they are to apply for the benefit of the wife. There is no fraud upon creditors, nor anything that offends against the law: *Twopeny* v. *Peyton* (1); *Godden* v. *Crowhurst* (2); *In re Bullock*. (3) A gift may even be valid, although its object is to defeat creditors. The effect of the garnishee order was to bring into operation the discretionary trust for the benefit of the wife.

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March 7. STIRLING J. (after stating the facts). The trusts declared of the income of the testator's estate during the life of William Henry Sampson are to me novel in form, and apparently have not hitherto been the subject of judicial consideration. They are not, perhaps, altogether happily expressed; but the object of the testator appears to be that a vested right or interest should not arise in the income except as it accrued due, i.e., such right or interest was not to arise as to any portion of the income until (at the earliest) such portion either accrued due or came to the hands of the trustees, and then only as to such portion. When some portion of the income accrues due or comes to the trustees' hands the testator directs this portion to be dealt with in one of two ways, according as the son has or has not done or suffered an act which would prevent his personal enjoyment of it: if he has not, this portion of the income is to be paid to him; if he has, then it is to be applied at the discretion of the trustees for the benefit of the wife and children of the son. There is then in effect a series of alternative limitations declared of the successive instalments of income which reach the hands of the trustees. These limitations must all take effect during the lifetime of the son, and do not offend against the rule against perpetuities; neither do I see that they can be treated as objectionable on the ground of repugnancy or otherwise; and in my judgment they are valid in law.

It is next to be considered at what precise period of time one or other of these alternative limitations is to take effect. It is contended on behalf of the plaintiff that the son takes no

(1) 10 Sim. 487. (2) 10 Sim. 642.
(3) W. N. (1891) 62.

vested right or interest to or in any portion of the income until it has actually reached his hands; and in support of this view the recent decisions of the Court of Appeal in *Hood Barrs* v. *Cathcart* (1) and *Loftus* v. *Heriot* (2) are relied on.

It must be taken to be established (unless and until the House of Lords decide otherwise) that the restraint on anticipation in the case of a married woman is operative until the fund affected by the restraint has actually reached her hands. This, however, is not a case of the rights of married women for whose benefit the restraint on anticipation was devised, nor is it in strictness one in which anticipation or alienation is restrained: the question rather is whether the son ought to be treated as having acquired any title to any portion of the income until it has actually reached his hands; or whether a right to income vests in him at an earlier date. There is a class of cases which have not unfrequently been considered by the Courts, and appear to me to have some bearing on this point: I mean those in which there has occurred a gift over on the death of a legatee before actually receiving his legacy, and among them I may mention *Hutcheon* v. *Mannington* (3); *Gaskell* v. *Harman* (4); *Law* v. *Thompson* (5); *Martin* v. *Martin* (6); *Minors* v. *Battison* (7); *Johnson* v. *Crook* (8); *In re Collison* (9); *Bubb* v. *Padwick* (10); *In re Chaston* (11); *In re Wilkins* (12); *Wilks* v. *Bannister*. (13) These cases are not entirely consistent among themselves; but this at least they establish—that whether or not a testator can effectually cause a vested gift to be divested before it has actually come to the hands of the legatee, such an intention ought not to be attributed where the words are not clear; and in cases where the words are susceptible of such an interpretation, the Court has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to

(1) [1894] 2 Q. B. 559.
(2) [1895] 2 Q. B. 212.
(3) 1 Ves. 366.
(4) 11 Ves. 489.
(5) 4 Russ. 92.
(6) L. R. 2 Eq. 404.
(7) 1 App. Cas. 428.
(8) 12 Ch. D. 639.
(9) Ibid. 834.
(10) 13 Ch. D. 517.
(11) 18 Ch. D. 218.
(12) Ibid. 634.
(13) 30 Ch. D. 512.

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continue beyond that at which the legacy is de jure receivable. The Courts in such cases favour early vesting, regarding it as undesirable that rights and interests should depend on the degree of diligence with which trustees perform their duties. The cases to which I have referred are not direct authorities in the present case, and the question must be determined on the consideration of the terms of this particular will. So regarding it, I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will. For the present case it is not necessary to determine which. If at that instant the son has not by his own act or default or by process or operation of law been deprived of the enjoyment of it, I think he is entitled to receive it. The trustees have not conferred on them by the will any discretion to retain it in their hands with a view to its application at a later period; and it seems to me that the right of the son to receive cannot be affected by subsequent events. This being so, it follows that William Henry Sampson's title to the sum mentioned in the summons accrued on April 16, 1895, and that the plaintiff consequently never became entitled to the benefit of the discretionary trust. The summons must therefore be dismissed.

Solicitors: *Field, Roscoe & Co., for C. F. Dean, Slough and Windsor*; *Rodgers, Thomas & Sandford, Sheffield.*

G. A. S.

In re WHITE AND SMITH'S CONTRACT.

STIRLING J.

1896

Jan. 29, 30; *March* 18.

[1895 W. 2280.]

Vendor and Purchaser—Leaseholds—Sale by Auction—Onerous Covenants—Duty of Vendor to disclose—Constructive notice to Purchaser.

The rule laid down by the Court of Appeal in *Reeve* v. *Berridge* (20 Q. B. D. 523), that it is primâ facie the duty of a vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to demand inspection of the vendor's title-deed before entering into a contract, is not confined to sales by private contract, but is equally applicable to sales by auction. Where, therefore, on a sale of leaseholds by auction the particulars and conditions of sale contained no statement as to the nature of the covenants in the lease (which were in fact onerous), nor any notice that the lease might be inspected at the office of the vendor's solicitors or elsewhere:—

Held, that the purchaser was not affected with constructive notice of the covenants; that he had not had a fair opportunity of inspecting the lease, and was, therefore, not bound to complete the contract.

ADJOURNED SUMMONS.

This was a purchaser's summons under the Vendor and Purchaser Act, 1874, asking for rescission of a contract for the sale of certain leaseholds on the ground that the lease contained onerous and unusual covenants, the existence of which had not been disclosed by the vendor before the contract was entered into, and of which the purchaser had not had notice.

The vendors were the executors of A. C. Ranyard, deceased, who died on December 14, 1894, possessed (inter alia) of four houses in Tower Street, St. Martin's Lane, Bloomsbury, held under a lease for ninety-eight years from June 24, 1853.

On April 29, 1895, these houses were together with other property put up for sale by auction at the Mart, Tokenhouse Yard, in the City of London, and formed Lot 3 at the sale. The applicant, Mr. J. T. Smith, attended the sale, and, having been declared the purchaser of Lot 3, he signed a contract in the usual form indorsed upon the printed particulars and conditions of sale.

The particulars and conditions described the property as being held under the above-mentioned lease, but contained no

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statement as to the nature of the covenants in the lease, nor any notice on the part of the vendors that the lease might be inspected at the office of their solicitor, or elsewhere; but the name of their solicitor was printed at the foot of the particulars. Upon the delivery of the abstract of title the purchaser discovered that the lease contained onerous and unusual covenants of which he had not had notice, and by his requisitions he claimed to have the contract rescinded on that ground. The vendors having declined to rescind the contract, the purchaser took out this summons.

It was not contended that the purchaser had actual knowledge of the contents of the lease; but the vendors alleged that he had had previous dealings with property in the neighbourhood, and was aware that the lease might possibly contain unusual covenants and conditions.

The vendors filed evidence to the effect that the lease was, at all reasonable times between the publication or advertisement of the particulars and the date of the actual sale, always open for inspection, "in accordance with the usual custom," by intending purchasers or bidders, at the offices of the vendors' solicitor, and that it was in fact during that time inspected there by several persons who intended to bid, and some of whom did in fact bid, for Lot 3; that during the whole of the sale and for some time prior thereto their solicitor was present, and had with him the lease for inspection by intending bidders, and the lease was then, "in accordance with the usual custom," open for inspection by any intending bidder; and that they believed that the said J. T. Smith, as a constant purchaser of leasehold property there, was well aware that he could then inspect the said lease and the covenants and conditions thereof, and that he had in fact all reasonable opportunities given to him for such inspection.

The purchaser, on the other hand, deposed that he did not inspect the lease prior to the sale, and was never informed and was not aware that it was open for his inspection; nor was he aware that the vendor's solicitor was in attendance at the sale. He stated that he had never before purchased leasehold property in the neighbourhood of St. Martin's Lane, and was

not aware that any special covenants and conditions were usually inserted in leases of property in that neighbourhood.

He had had no opportunity for examining the lease. It was no part of the conditions of sale that he should acquaint himself with the contents of the said lease, and he did not do so.

Stewart-Smith, for the purchaser. It is not disputed that the lease contains onerous covenants which in the absence of notice to the purchaser would preclude the vendor from obtaining specific performance of the contract: *Heywood v. Mallalieu* (1), *Shackleton* v. *Sutcliffe* (2), and 1 Dart on Vendors and Purchasers, 6th ed. p. 156. Merely giving a purchaser notice that he is buying a leasehold does not affect him with notice of the contents of the lease unless it be shewn that he has had a fair opportunity of examining the lease before entering into the contract. The vendors must disclose their title: *Hyde* v. *Warden* (3), *Reeve* v. *Berridge* (4), and *Midgley* v. *Smith*. (5) The purchaser is entitled to an order similar to that which was made in *In re Hargreaves and Thompson's Contract*. (6)

Hastings, Q.C., and *Ashton Cross*, for the vendors. It is not disputed that some of the covenants contained in the lease are unusual; but the question is whether the purchaser had a fair opportunity of inspecting the lease within the meaning of what was laid down by the Court of Appeal in *Reeve* v. *Berridge*. (4) In *Grosvenor* v. *Green* (7) it was held that a purchaser of leaseholds is bound to inform himself of the contents of the lease; but that case, no doubt, must be treated as now overruled. The purchaser was, however, well used to buying leaseholds at the mart, and was aware that according to a well-recognised custom at such sales the lease is always open to inspection at the office of the vendor's solicitor, whose name is given at the foot of the conditions of sale. It was the duty of the purchaser to go to the solicitor and ask to see the lease.

(1) 25 Ch. D. 357.
(2) 1 De G. & Sm. 609.
(3) 3 Ex. D. 72.
(4) 20 Q. B. D. 523.
(5) W. N. (1893) 120.
(6) 32 Ch. D. 454.
(7) 28 L. J. (Ch.) 173.

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The distinction between the present case and *Reeve* v. *Berridge* (1) is that this is a case of sale by auction, and there is a custom that the lease is always open to inspection before the sale.

The purchaser is not entitled to rescission. In *Midgley* v. *Smith* (2) the vendor had not got the lease, and the purchaser was not, therefore, in a position to have seen it. Here the lease was ready for inspection, and the purchaser cannot claim rescission on the ground that he did not take the opportunity which he must be taken to have known was open to him: *Cosser* v. *Collinge*. (3)

Stewart-Smith, in reply. The Court is in effect asked to extend the doctrine of *Hyde* v. *Warden*. (4) The rule laid down by the Court of Appeal in *Reeve* v. *Berridge* (1) applies equally to a sale by auction. [He also referred to *Brumfit* v. *Morton*. (5)]

Cur. adv. vult.

March 18. STIRLING J. (after stating the facts). At the hearing it was admitted by the vendors that the law applicable to the case is as laid down by the Court of Appeal in *Reeve* v. *Berridge*. (1) Fry L.J. in that case says (6): "The question, therefore, is, how far the mere notice of the lease in the contract, without any opportunity of inspecting it, or the agreement for a lease, affects the purchaser with notice of all the contents of that agreement. This question appears to us to be really covered by the authority of *Hyde* v. *Warden* (4) In that case the question arose, whether the taking possession of property agreed to be underleased, with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the Court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases including *Cosser* v. *Collinge*. (3) The Court rejected the argument, and said: 'We think it may be considered as settled that

(1) 20 Q. B. D. 523.
(2) W. N. (1893) 120.
(3) 3 My. & K. 283.
(4) 3 Ex. D. 72.
(5) 3 Jur. (N.S.) 1198.
(6) 20 Q. B. D. 527.

the principle of that case can only be applied where (as, indeed, was the case in *Cosser* v. *Collinge* (1)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease: see *Grosvenor* v. *Green* (2); *Smith* v. *Capron*.' (3) It was argued before us that the question in *Hyde* v. *Warden* (4) arose on a contract for a sub-lease, whilst in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one subject to the covenants contained in the lease, and the effect of notice must therefore be alike in both cases. Criticisms on *Hyde* v. *Warden* (4) were also addressed to us, and in particular we were asked to hold it inconsistent with *Grosvenor* v. *Green* (2), which was decided by Lord Hatherley when Vice-Chancellor. But in this Court we are bound by the authority of *Hyde* v. *Warden* (4), and we cannot but observe that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title-deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract."

In my opinion the last paragraph of that passage of the judgment establishes that it is primâ facie the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and that this is so whether the sale be by public auction or private contract. It seems to me that the Court of Appeal meant to lay down a general rule applicable to all sales, though, no doubt, the practice with reference to sales by private contract was put forward as one of the grounds for the establishment of the rule.

It is not pretended that the applicant had any actual

(1) 3 My. & K. 283.
(2) 28 L. J. (Ch.) 173.
(3) 7 Hare, 185.
(4) 3 Ex. D. 72.

STIRLING J. knowledge of the contents of the lease; but it is said that he had a fair opportunity of ascertaining its provisions. [His Lordship then referred to the evidence, and continued:—]

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It must be taken to be admitted by the applicant for the purposes of this application that the acts of the respondents were "in accordance with the usual custom," and that the applicant knew this. The vendors, however, fail to say what means of knowledge they have on the subject of this alleged custom, or what the nature of the custom is, or how far it extends. It is well known to be a common practice for vendors of leaseholds to deposit the lease with their solicitors or elsewhere prior to the sale, and to announce the fact in the particulars of sale; and I am quite prepared to believe that in the majority of sales in the City of London this course is adopted. For aught that appears, this may be all that is referred to in the respondents' affidavit. At all events, the respondents do not venture to pledge themselves that a vendor in the City of London is to be taken to have conformed to this practice if he does not give notice to the contrary, while the applicant expressly says that he was not aware that the lease was open for his inspection, by which I understand him to mean that he was not aware that he was entitled as of right to see the lease, or that he would not be met with a refusal if he applied to see it before the sale.

The question, then, arises whether a purchaser under such circumstances ought to be fixed with constructive notice of the contents of the lease. The circumstances under which a purchaser without actual knowledge of a state of facts ought to be held to have constructive notice of it have been recently considered by the Court of Appeal in *Bailey* v. *Barnes* (1), where the law as laid down by Lord Cranworth in *Ware* v. *Lord Egmont* (2) was adopted. One test according to what is there laid down appears to be whether inquiry ought to have been made "as a matter of prudence, having regard to what is usually done by men of business under similar circumstances." In the application of this test, all the circumstances of the case must be taken into consideration. I can imagine cases in which the Court might hold that a purchaser had failed to take reason-

(1) [1894] 1 Ch. 25. (2) 4 D. M. & G. 460.

able precautions if he did not avail himself of an opportunity, or even a possible opportunity, of examining a lease; as, for example, where knowledge was brought home to him of the existence of similar covenants in leases of adjoining portions of the same estate. If, however, it be (as I think it is) the duty of the vendor to disclose the state of his title, and not the duty of the purchaser to inquire into it, and if the purchaser's attention is not called to the possible existence of onerous covenants either by the vendor himself or by information otherwise acquired, I think that a business man of ordinary caution might abstain from examining a lease in the absence of any intimation on the part of the vendor that he will not be met with a refusal if he applies to examine the lease before sale. The applicant says in his affidavit that he had not before purchased property in the neighbourhood of St. Martin's Lane, and that he was not aware that leases of property in that neighbourhood usually contained special provisions of an onerous nature.

I think that it is not made out that the applicant had a fair opportunity of inspecting the lease within the meaning of the rule laid down in *Reeve* v. *Berridge* (1), and consequently that he is entitled to the relief for which he asks.

Solicitors: *J. H. Smith; T. H. Hiscott.*

(1) 20 Q. B. D. 523.

G. A. S.

KEKEWICH J.

1896

Feb. 21.

COLLINSON *v.* JEFFERY.

[1895 C. 797.]

Practice—Redemption Action—Order—Payment into Court—Default—Dismissal of Action—Mistake—Extension of Time—Jurisdiction.

In a redemption action an order was made giving the plaintiff leave to lodge the mortgage money in court, and that, "in default of such lodgment within two months from the date of this order, the action be dismissed with costs." Under a bonâ fide mistake the plaintiff failed to lodge the money in court until after the two months fixed by the order:—

Held, that, notwithstanding the expiration of the two months, the action was not dead, but that the Court had jurisdiction, at the instance of the plaintiff, to extend the time limited by the order so as to include the actual date of lodgment.

THIS was a redemption action, by originating summons, by second mortgagees and the mortgagor against the first mortgagee. The plaintiffs, the second mortgagees, had, before action, tendered to the defendant a sum of 401*l.* 10*s.* 5*d.* for principal, interest and costs, but this tender had been refused.

By their summons the plaintiffs asked to be at liberty to pay into court the sum of 420*l.* estimated to be then due for principal, interest and costs; for accounts, and redemption.

By an order made by the Court of Appeal on November 6, 1895, it was ordered that the plaintiffs should be at liberty to make the lodgment in court of the 420*l.*, and that, "in default of such lodgment within two months from the date of this order, the action be dismissed with costs to be paid to the defendant by the plaintiffs": and various accounts were directed. The order was passed and entered on December 17, 1895.

The 420*l.* was paid into court by the plaintiff, Collinson, one of the second mortgagees, but not until February 6, 1896, after the expiration of the two months limited by the order. The delay was, it appeared, due to a mistaken impression on the part of the plaintiffs' solicitor (who was himself also one of the plaintiffs) and his managing clerk, that the two months began to run not from the date of the order being pronounced, but from its being passed and entered.

The defendant insisted that as the plaintiffs had made default in paying the money into court within the time fixed, the action stood dismissed with costs.

The plaintiffs then served the defendant with a notice of motion asking that, notwithstanding that the period of two months limited by the order had expired on February 6, when the lodgment of the 420*l.* in court was effected, such period should be extended to and be taken to be inclusive of that date, and that the lodgment in court on that date should be deemed to have been duly made in compliance with the order.

The motion was supported by an affidavit by the plaintiff Collinson, stating that since the date of the order he had always been ready and willing on a request being made by his solicitor in the action to pay the 420*l.* into court, and had since that date always had at his disposal the means to pay that sum. There was also an affidavit by the plaintiffs' solicitor explaining how the mistake had arisen, and also stating that Collinson was a man of substantial means and could at any time after the date of the order have paid the money into court had he, the solicitor, asked him to do so, and that he, the solicitor, on February 6, believing the period had not expired, instructed his managing clerk to pay in the money, which he did.

Warrington, Q.C., and *Johnston Edwards*, for the plaintiffs. The evidence shews clearly that our default has arisen purely from a mistake as to date, and not from inability to pay; therefore the case is one in which the Court may properly grant relief. This is not the case of an ordinary redemption action in which the plaintiff coming to redeem fails to have his money ready, for we made a tender which was refused. Notwithstanding the form of the order, the time may be extended, just as in the case of the order in a foreclosure action.

W. G. Lemon, for the defendant. The application is too late, for, under the form of the order, the action is dead, and therefore the jurisdiction of the Court has gone: *Whistler* v. *Hancock* (1); *King* v. *Davenport* (2); *Script Phonography Co.* v. *Gregg*. (3) Moreover, in a redemption action, it is contrary to the

(1) 3 Q. B. D. 83. (2) 4 Q. B. D. 402. (3) 59 L. J. (Ch.) 406.

KEKEWICH J. 1896 COLLINSON v. JEFFERY.

practice of the Court to extend the time for redemption, for the basis of the action is that the plaintiff has his money ready: *Novosielski* v. *Wakefield* (1); *Faulkner* v. *Bolton*. (2) The evidence on this point is too loose: it does not clearly shew that the plaintiff was ready with the money in his hand.

KEKEWICH J. There is a phrase of which the late Knight Bruce L.J. was fond, but which has since fallen into disuse—"a slip in the office." The Lord Justice always endeavoured to assist an application where there was "a slip in the office," provided it was an honest slip. I am satisfied that there was a slip in the office in this case, and that it was honest. There was a mistake, and the party who has suffered from it is entitled to the sympathy of the Court. It is clear that the money was to be paid into court "within two months from the date of this order"; yet the plaintiff's solicitor or his managing clerk seems to have thought the order meant that the payment-in was to be made within two months from the date of the order being passed and entered. At all events, a blunder was made and the money was not paid in until too late. But it was ultimately paid in, and it is now in court. The defendant has the security for which he bargained, and I think this is a case in which the Court ought to relieve the applicant from the consequences of the slip. Therefore, believing the slip to have been thoroughly honest, a view which is confirmed, not only by the affidavit of the plaintiff, Collinson, himself, but by the affidavit of his solicitor, who says his client is a man of substance and could have paid when called upon, I think I ought to relieve the applicant if I can. Mr. Lemon says I cannot, because the action is dead. If that is the right view, the matter is beyond my power. It appears to me, however, that this action is not dead. It is comatose; it is moribund; but a final stroke is required to effect death. That final stroke has not been delivered, and therefore, in my opinion, the application is properly made and the order asked for may be granted.

Authorities, two in the Queen's Bench Division and one in the Chancery Division, have been quoted to shew that I am

(1) 17 Ves. 417. (2) 7 Sim. 319.

incompetent now to make the order at all. All those cases were concerned with dismissal for want of prosecution. The defaulting party was ordered to take a step in the action within a certain time, and, if he did not do so, the action was to be at an end. The object of that is to put an end to litigation by compelling the defaulting party to proceed within a certain time on pain of dismissal. But that practice has never been applied to a case of this kind, where the question is one of payment of money into court as security or under an order.

The form of the order in a redemption action is that if the money is not paid by a certain time "let this action from thenceforth stand dismissed out of this Court." No doubt, there is great difficulty in dealing with the action after the time for payment has expired when peremptorily fixed; yet it is not the practice to say that the action is dead, for it is necessary in this and other analogous cases to make a further application in order to obtain the absolute dismissal of the action. There is another form of order available and appropriate where the Court thinks that severe terms should be imposed—namely, that on failure to do certain acts within a specified time then "the action do stand dismissed without further order." In this case no such words are in the order. In my opinion the applicant is entitled to an order in the terms of the notice of motion. Of course this is an indulgence to the applicant, for he is coming after time, though the money is safe enough; and therefore he must pay the costs of the application.

Solicitors: *E. F. M. Ryan; Hepburn, Son & Cutcliffe.*

G. I. F. C.

KEKEWICH J.

1896

March 3.

BOVILL *v.* ENDLE.

[1895 B. 811.]

Mortgage—Redemption—Principal, Interest and Costs—Tender—Notice—Six Months' Interest—Enforcing Security—Mortgagee taking Possession.

The rule that a mortgagee who has demanded payment of his mortgage debt, or has taken steps to compel payment of it, cannot refuse tender of his principal, interest and costs on the ground that he is entitled to six months' notice or six months' interest in lieu of notice, applies whether the time fixed for payment by the proviso for redemption in the mortgage deed has expired or not; and the rule also applies where the mortgagee has entered into possession of the mortgaged property, entry into possession being, in effect, a demand for payment.

Brown v. *Cole* (14 Sim. 427; 14 L. J. (Ch.) 167) considered.

By a building agreement made September 7, 1894, between the defendants Endle and Morgan of the one part and the defendant Robert Thomas Jones, a builder, of the other part, Endle and Morgan agreed to grant Jones a lease for 1000 years, at a ground-rent, of six plots of land at Millbrook, in the county of Southampton, and Jones agreed to erect and finish, complete for occupation, within twelve months six houses of a stated value.

By a deed dated the next day Jones mortgaged the plots of land and the benefit of the building agreement to Morgan for 600*l.*, of which 50*l.* was advanced at once, 25*l.* per house to be advanced as the building reached three successive stages, and the balance when the houses had been completed; such further advances to be made upon the certificate of Morgan's surveyor, whose fees were to be paid by Jones. The mortgage contained a proviso for redemption on payment by the mortgagor of all moneys advanced, with interest, at the expiration of six calendar months from the time the same should be advanced.

On September 28, 1894, Jones granted a second mortgage of the premises to the plaintiff, a timber merchant, as security for value of goods supplied.

On November 28, 1894, Jones gave a third mortgage of

the premises to the defendants, Elliott Brothers, to secure money due.

On December 3, 1894, Jones gave the plaintiff a fourth mortgage to cover the amount of the second mortgage as well as a further advance.

On January 25, 1895, Jones absconded, having had 550*l.* only advanced to him under the first mortgage, and leaving, it was said, two of the houses unfinished.

On January 31, 1895, the plaintiff gave notice to Morgan and his surveyor not to make any further advances to Jones or any assignee of his upon the security of the first mortgage; but notwithstanding such notices Morgan subsequently paid the defendants, Elliott Brothers, 30*l.* and to their surveyor 20*l.*, those defendants having, on February 15, 1895, taken a transfer of Morgan's mortgage, and thus become first mortgagees. On taking the transfer, Elliott Brothers forthwith entered into possession of the mortgaged property, and expended certain sums in completing the two unfinished houses, or making them ready for occupation. They also received the rents of the houses that were finished and occupied.

On February 22, 1895, the plaintiff tendered the defendants, Elliott Brothers, they being then in possession, 635*l.* in payment of principal, interest and costs due to them in respect of the first mortgage, but they refused the tender, and thereupon, on the same day, the plaintiff, as second mortgagee, issued the writ in this action for redemption against the reversioners, also against Elliott Brothers as first mortgagees in possession, and the mortgagor Jones.

The defendants, Elliott Brothers, contended that the plaintiff was not entitled at any time before March 8, 1895, when the six months from the date of the mortgage would expire, to make any tender to them as first mortgagees.

The action now came on for trial.

Elgood, for the plaintiff. I submit that, as the defendants, Elliott Brothers, entered into possession of the property and the receipt of the rents, the plaintiff, as the person entitled to redeem, could insist upon their accepting his tender of principal, interest

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and costs, notwithstanding that the day for payment fixed by the proviso for redemption had not yet arrived. *Brown* v. *Cole* (1) will probably be cited as an authority that a mortgagee cannot be compelled to accept a tender before the appointed day; but that case does not apply, for there the mortgagor had no right to make a tender at all, the mortgagee not having taken any proceedings; whereas here the first mortgagees chose to enforce their security by taking possession; and moreover, the plaintiff, as second mortgagee, could redeem at any time, especially when the first mortgagees were in possession. There is no direct authority on the point, but I submit that, upon principle, when a mortgagee enters into possession under his mortgage, he is "taking proceedings" to enforce his security, or compel payment, and that gives the mortgagor a right to pay him off at once, without six months' notice or interest in lieu of notice: *In re Alcock* (2); *Letts* v. *Hutchins* (3); *Banner* v. *Berridge* (4); *Smith* v. *Smith*. (5).

E. Ford, for the defendants Elliott Brothers. I rely on *Brown* v. *Cole* (1), which is an authority that has never been disputed. The only reason given why it should not apply to this case is that the first mortgagees had gone into possession; but the mortgagor, Jones, had absconded, and therefore this is not the case of a mortgagee taking steps to enforce his security, but merely the case of his protecting the property and receiving the rents, which might otherwise be lost, until the time for payment arrives.

Elgood, in reply.

KEKEWICH J. This case raises a new point, namely, whether a mortgagee exercising his legal right of entering into possession of the mortgaged property thereby deprives himself of his equitable right of insisting on six months' interest or six months' notice.

It appears from the cases that if the mortgagee takes proceedings in court to recover his mortgage money from the

(1) 14 Sim. 427; 14 L. J. (Ch.) 167.
(2) 23 Ch. D. 372.
(3) L. R. 13 Eq. 176.
(4) 18 Ch. D. 254, 279.
(5) [1891] 3 Ch. 550, 552.

mortgagor, or, if he is dead, from his estate, then he, the mortgagee, cannot refuse a tender of his principal, interest and costs on the ground that he is entitled to six months' notice. It is said, "You have demanded payment by your proceedings, and here is payment: you cannot decline what you have demanded." This was decided by Wickens V.-C. in *Letts* v. *Hutchins* (1), which was cited in *Smith* v. *Smith* (2), where Romer J. considered that the ground of Wickens V.-C.'s judgment was that the mortgagee had taken steps to compel payment of the debt, and was therefore not entitled to six months' interest in lieu of notice. He lays down the rule shortly thus (3): "If the mortgagee has himself demanded payment of the debt, or has taken any steps to compel payment of it, no notice by the mortgagor, and no payment of interest in lieu of notice, is required."

Then comes a second question, Is entering into possession taking proceedings with a view to compelling payment of the debt? The mortgagee, in taking possession, exercises his legal right, but does not directly ask for payment. He says: "The houses will not be completed within the time or in a satisfactory manner except by my taking possession: I will run all risk in order to assert my legal rights." It appears to me that, although the case is not actually covered by authority, yet it is by principle; and that a mortgagee cannot enter into possession for his own benefit and then say he is entitled to remain in the position of a mortgagee out of possession, and to ask for six months' notice or interest. The two positions are inconsistent. In my opinion, by entering into possession the mortgagee says he requires payment, and payment in the way in which the law gives it to him.

Then does *Brown* v. *Cole* (4) make any difference? In my opinion it does not. That case decides that the mortgagor cannot, before the time limited for payment to the mortgagee expires, either insist on acceptance of a tender of the mortgage money or take proceedings to redeem. But that is because during that time the mortgage must remain as a security for

(1) L. R. 13 Eq. 176.
(2) [1891] 3 Ch. 550.
(3) [1891] 3 Ch. 552.
(4) 14 Sim. 427; 14 L. J. (Ch.) 167.

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the money advanced, and it is not competent for the mortgagee or the mortgagor to disturb that relation. But if the mortgagee himself disturbs that relation, as he has done here, though he has been led into doing so by the mortgagor absconding, he cannot insist on notice to pay off being served upon him; and therefore I hold that the plaintiff is right, and that no interest is payable in lieu of notice.

Solicitors: *Elgood & Moyle; Bramall, White & Sanders.*

G. I. F. C.

KNIGHT *v.* SIMMONDS.

[1894 K. 990.]

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Jan. 30, 31; *Feb.* 1, 3, 22.

Building Estate—Restrictive Covenants as to Trade and Minimum Value of Houses—Sub-scheme of part of Estate—Restrictive Covenants modified—Noxious or Offensive Trades—Alteration in Character of Estate—Laundry—Acquiescence—Injunction.

In 1852 a building estate was laid out in lots for private residences and put up for sale by public auction, subject to conditions which prohibited any trade or business on any lot, and required that on certain lots the value of a single house should be not less than 600*l.*, and of a pair of semi-detached villas should be not less than 900*l.* A. bought lot 49 at the sale, and covenanted with the vendor in the terms of the conditions, but qualified by the words "without the previous consent in writing of the vendor, his heirs, appointees, or assigns." In 1881 K. acquired part of lot 49 with notice of the original conditions and of the qualified covenant, and he built a house of more than the covenanted value.

In 1853 the lots unsold at the auction were sold and conveyed by the same vendor subject to the same conditions to B. and P., and they entered into an absolute covenant in the terms of the original conditions. B. and P. then sub-divided their purchase into numerous small lots and sold them subject to conditions which required each purchaser to execute a deed of covenant with them containing provisions to keep up the residential character of the estate, and based in the main on the original conditions, but modified to this extent, that no trade or business was to be carried on upon any lot which should be "noisy, noxious, dangerous, or offensive to the neighbourhood or to the owners or occupiers of any of the land, or in anywise injurious to the same land or any part thereof." W. bought some lots of B. and P. with notice of the original restrictions and signed the deed of covenant, and he built a house of more than the covenanted value. One T. also bought two lots of B. and P. with notice of the original restrictions and signed the deed of covenant, and in 1893 these two lots were acquired by S. with the like notice. S. planned a pair of semi-detached villas which together were worth 900*l.*, but each by itself was of less value than 600*l.* He built one of them, and at the rear thereof erected a building and commenced to carry on a public laundry.

K. and W. brought an action against S. to restrain him from carrying on any trade or business, or in the alternative, from carrying on the laundry as being a breach of the modified restriction against trade in the deed of covenant. They also claimed an injunction to restrain S. from building on his land in breach of the covenant as to value. There was evidence that, on the part of the estate where S. was, some of the houses had for some time been let in tenements at weekly rents, and that for a considerable

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period the owners and occupiers of several of the houses had been carrying on trades or businesses, particularly laundry businesses, but in such a quiet, unobtrusive and restricted manner as not to attract the attention of K. or W. or other passers-by :—

Held, that the qualified covenant in A.'s conveyance did not preclude K. from insisting on the original conditions, that he had not acquiesced in the breaches that had been committed, and that there had not been such a departure from the original scheme, nor change in the original residential character of the estate, as rendered it inequitable for K. to enforce the original conditions.

But *held*, that W. could not enforce the original scheme but only the modified provisions of B. and P.'s sub-scheme, and that under the circumstances the laundry was not a breach of the modified restriction against trade in the deed of covenant :—

Held also, that S. had not broken the condition as to value merely by building in the first instance one of the pair of semi-detached villas.

But, *semble*, he was bound to erect the companion villa within a reasonable time ; and *quære*, how much longer could it remain unbuilt without a breach of the condition being committed.

IN 1852 a freehold estate at Wimbledon, known as Cottenham Park and comprising about 228 acres, was purchased by one Finch and laid out on a building scheme for the erection of superior dwelling-houses, and was put up for sale in lots by public auction on November 5, 1852, subject to particulars and conditions which provided (inter alia) that each purchaser should covenant with the vendor, his heirs, appointees, and assigns, not to permit or suffer any trade or business whatsoever to be set up or carried on in or upon any of the lots in the conditions of sale mentioned, . . . nor to permit or suffer to be erected on lots 36 to 44 and 48 and 50 any dwelling-house, exclusive of outbuildings, of less cost price than 600*l.*, or pair of semi-detached villas of less cost price than 900*l.* each pair.

At this sale lots 47 and 49 were purchased by one Smith, and were conveyed to him by deed dated December 28, 1852. This deed recited the sale by public auction on November 5, 1852, and that Smith was the purchaser of lots 47 and 49 subject to the conditions of sale, and that it was by the said conditions of sale stipulated that the purchasers of lots 47 and 49 should enter into such covenants with the vendor respecting the future uses and occupation of the premises comprised therein, and also respecting the erection of dwelling-houses thereon, as therein-

after expressed; and thereby Smith covenanted with Finch that he would not at any time thereafter "without the written consent in that behalf of Finch, his heirs, appointees, or assigns first had and obtained, permit or suffer, &c.," following the words of the conditions of sale as to trades and building value above stated. The qualifying words, "without the written consent, &c." were not in the conditions of sale. In 1881 the plaintiff Knight purchased of one Trist, whose predecessor in title was Smith, part of what had been lot 49, and it was duly conveyed to him. He bought with notice of the original conditions of sale of November 5, 1852, and of the deed of December 28, 1852. The house erected by the plaintiff Knight on his plot was of more than the covenanted value.

The only lots not disposed of at the sale on November 5, 1852, were lots 36 to 44 (both inclusive) and lots 48 and 50; and these were soon afterwards sold by Finch to Messrs. Buckle & Philps, subject to the same conditions of sale, and were conveyed to them by deed dated May 30, 1853. By this deed Messrs. Buckle & Philps entered into an absolute covenant with Finch, without any qualifying words, in the exact terms of the original conditions of sale as to trades and building value above stated. Messrs. Buckle & Philps then laid out their purchase on a building scheme, sub-dividing it into 231 lots, for the erection of private dwelling-houses, which they sold from time to time subject to conditions of sale which required each purchaser to enter into a deed of covenant with them for the purpose of keeping up the residential character of the estate, and containing provisions based in the main on the original conditions of sale of November 5, 1852. This deed of covenant was dated June 14, 1853, and recited the deed of May 30, 1853, and thereby Messrs. Buckle & Philps and the several purchasers parties thereto mutually covenanted with each other (inter alia) that they, the said covenanting parties, their respective appointees, heirs, or assigns, would not at any time thereafter erect or permit to be erected on any part of any lot or lots of the said building land numbered from 1 to 167, both inclusive, so vested in or purchased by them, him, or her (the said covenanting parties or party) as aforesaid any dwelling-house or other building whatsoever

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(except outbuildings) . . . . of less cost price than 600*l.*, or pairs of semi-detached villas of less cost price than 900*l.* each pair. And further that they, the said covenanting parties or party, their appointees, heirs, or assigns, would not at any time thereafter carry on, or make, or permit, or suffer to be carried on or made upon any or either of the said lots of the said building land so vested in or purchased by them, him, or her (the said covenanting parties or party) as aforesaid, or any part thereof, any trade, business, process, or deposit which should be noisy, noxious, dangerous, or offensive to the neighbourhood or to the owners or occupiers, owner or occupier, of any of the said land, or in anywise injurious to the same land or any part thereof.

The plaintiff Williams bought of Messrs. Buckle & Philps four lots, forming part of their sub-scheme, and erected thereon a house of more than the covenanted value. He bought with notice of the deed of May 30, 1853, and was himself a party to and executed the deed of covenant of June 14, 1853.

In 1853 one Tabey purchased of Messrs. Buckle & Philps lots 127 and 128, forming part of their sub-scheme, and being lot 48 of the original scheme. He bought with notice of the deed of May 30, 1853, and was a party to and executed the deed of covenant of June 14, 1853. He was the predecessor in title of the defendant, who acquired lots 127 and 128 in 1893, with notice of the deed of May 30, 1853, and June 14, 1853.

Soon afterwards the defendant lodged with the local authorities plans for the erection on his plots of two semi-detached villas, which together would be of the covenanted value of 900*l.*, but separately would be less than the covenanted value of 600*l.* for one dwelling-house. He at once erected one of the villas, and commenced to erect at the rear of it a building for the purpose of carrying on a public laundry. Notice was given by the plaintiffs to the defendant before and while he was erecting the building that the business would be a breach of the restrictive covenants, and that they objected thereto. He, however, persisted in completing the building, and commenced to carry on the business. Thereupon the plaintiffs brought this action claiming an injunction to restrain the defendant from carrying on upon the plots of land occupied by him any trade or business

whatsoever, and in particular the trade or business of a laundryman; in the alternative, an injunction to restrain the defendant from carrying on the said trade or business so as to be noisy, noxious, dangerous, or offensive to the neighbourhood, or the owners or occupiers of the estate; also an injunction to restrain the defendant from keeping erected on his land any building not in accordance with the covenants.

The defendant by his defence alleged that the restrictive covenants in the deeds of December 28, 1852, May 30, 1853, and June 14, 1853, had not been observed, and that the plaintiffs had themselves disregarded them, and he relied on the laches and acquiescence of the plaintiffs. He also alleged that the character of the estate and the surrounding neighbourhood had, by reason of the conduct of the plaintiffs and the owners and occupiers of other portions of the estate, so changed, and become so entirely different from what was originally contemplated, that it would be unreasonable and oppressive to enforce the restrictive covenants.

In December, 1895, a summons by the defendant under Order XVI., r. 1, to strike out the statement of claim, on the ground that it disclosed two separate causes of action by two separate plaintiffs which could not properly be joined together as one action, was dismissed with costs.

Issue was joined, and the action now came on for trial.

It appeared from the evidence that various trades, such as cowkeepers, market-gardening, and laundries (but chiefly laundries) had been carried on for many years by the owners and occupiers of houses on the plots of land governed by the deed of covenant of June 14, 1853, and particularly on two blocks of houses called Alston Villas and Lime Villas. These plots of land were coloured green on the plans, and for convenience were referred to as "the green estate." Some of these houses had for some time been let in tenements at weekly rents. Some of the laundries had been carried on from ten to sixteen years, and in one case for twenty years; but in all cases the various businesses had been conducted within or at the rear of the premises, and so quietly and unostentatiously as not to attract the attention of the plaintiffs or other passers-by. The defendant for the

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past four years had lived at No. 3, Lime Villas, and carried on there a laundry business, which he purchased of the previous occupier for 70*l*. The plaintiffs were unaware of all these circumstances.

Astbury, Q.C., and *R. M. Bray*, for the plaintiffs. The evidence shews that the neighbourhood as a whole has been distinctly preserved as a residential estate. The qualified covenant in the conveyance to Smith, the predecessor in title of the plaintiff Knight, is not a waiver of the original conditions: *German* v. *Chapman* (1); and both the plaintiffs are entitled to enforce them: *Richards* v. *Revitt*. (2) The present case is very like *Meredith* v. *Wilson*. (3) At any rate, the laundry is an annoyance to the plaintiffs, and depreciates the value of the adjoining plots. The onus is on the defendant to shew that the plaintiffs have acquiesced in the breaches that have been committed. As to the building covenant, the defendant's villas should have been built together or within a reasonable time of each other. He has not yet commenced the second villa.

Eve, Q.C., and *Macnaghten*, for the defendant. On the facts it is clear that what was originally contemplated in 1852 had come to an end by 1893. The modified covenant taken by Finch from Knight's predecessor in title was a waiver of the stringent provisions of the original scheme, and prevents him from enforcing them. As to Williams, he and the other parties to the sub-scheme of the green estate can only enforce the modified covenants of the deed of June 14, 1853. On the evidence the original scheme as to this part of the estate has been abandoned, and the character of the locality and the class of tenants have changed, and it is no longer exclusively used for residential purposes. Many of the businesses have now been carried on for many years, and there has been no attempt at concealment. The plaintiffs must be taken to have acquiesced in what was going on: *Duke of Bedford* v. *Trustees of the British Museum* (4); *Sayers* v. *Collyer* (5); *Kelsey* v. *Dodd*. (6) The defendant's

(1) 7 Ch. D. 271.
(2) Ibid. 224.
(3) 69 L. T. (N.S.) 336.
(4) 2 My. & K. 552.
(5) 28 Ch. D. 103.
(6) 52 L. J. (Ch.) 34.

laundry is not a breach of the modified covenant against noxious or offensive trade in the deed of June 14, 1853: *Tod-Heatly* v. *Benham* (1); and his house, which is one of a pair, is not a breach of the covenant as to value. He was not bound to build both at the same time.

Astbury, in reply, cited *Renals* v. *Cowlishaw* (2); *Mackenzie* v. *Childers* (3); *De Bussche* v. *Alt.* (4)

Cur. adv. vult.

Feb. 22. ROMER J. Having regard to the building scheme, and the conditions and provisions in accordance with and subject to which this estate was offered for sale in lots on November 5, 1852, and was sold, and to the restrictive covenants entered into with the vendor by the purchasers of the various lots with the object of carrying out the scheme, it is clear that, subject to the points which I have specially to notice, any assignee of part of the estate is entitled in equity to enforce the scheme and restrictive covenants as against any other assign who takes with or is affected with notice. And indeed this has not been challenged by the defendant before me. But he raises certain points with which I proceed to deal. In the first place, with regard to the plaintiff Knight, the defendant points out, as the fact is, that Knight's predecessor in title, who bought lots 47 and 49, in the conveyance of those lots dated December 28, 1852, did not covenant strictly in the form which was provided for by the conditions of sale of November 5, 1852, and which was adopted in the conveyances of the other lots. The difference consisted in this (speaking shortly), that as to lots 47 and 49 the restrictive covenant was not absolute, but made the purchaser agree not to do the various acts intended to be prohibited without the previous consent in writing of the vendor, his heirs or assigns. The defendant says that this was such a departure from the scheme and the form of covenant in the conditions of sale as to prevent the purchaser of lots 47 and 49, or any of his assigns, including Knight, from being able to enforce the scheme and covenants as against the purchasers of the other lots or their

(1) 40 Ch. D. 80.
(2) 9 Ch. D. 125.
(3) 43 Ch. D. 265.
(4) 8 Ch. D. 286, 314.

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assigns. But no consent in writing or otherwise has ever been given to any breach of or any departure from the scheme or restrictions imposed by the conditions of sale. Moreover, the covenant in the deed of December 28, 1852, is expressed to be entered into in pursuance of and in order to carry out the provisions of the conditions of sale. And this being so, I think it would be wrong to hold that by the mere difference in form of the restrictive covenant above indicated the purchaser of lots 47 and 49 and his assigns were to be for ever precluded from enforcing the scheme or the restrictions as against any of the other lots, especially when it is considered that in any case the purchaser of lots 47 and 49 and his assigns remained liable in every way to the scheme and restrictions. I therefore hold that this objection of the defendant is not well founded, and that the plaintiff Knight is entitled to enforce the restrictions.

The next objection of the defendant affects the plaintiff Williams only. The defendant and Williams are both assigns of the original purchasers of certain lots which have for brevity been called the green estate. Now these original purchasers in the deed of conveyance to them of May 30, 1853, entered into a covenant with the vendor strictly in accordance with the covenant provided for by the conditions of sale, and it is clear that the defendant acquired his plot of land, which forms part of the green estate, with notice of the covenant contained in the deed of May 30, 1853. But the original purchasers of the green estate subsequently sold that estate in much smaller plots, and by a deed of mutual covenant dated June 14, 1853, they and their sub-purchasers entered into a series of restrictive covenants intended to govern that estate, and these, though in the main in accordance with the original restrictions, yet differ in some minor points, and in particular in one which has a substantial bearing on this action so far as the plaintiff Williams is concerned. By the original restrictions no trade or business whatever was to be set up or carried on in or upon any of the lots. But, by the deed of June 14, 1853, this was modified (so far as I need state it for the purposes of this case) so as to prevent the carrying or making upon any part of the green estate of "any trade, business, process, or deposit which

shall be noisy, noxious, dangerous, or offensive to the neighbourhood, or to the owners or occupiers, owner or occupier, of any of the said land (i.e., any part of the green estate), or in anywise injurious to the same land or any part thereof." Now the first question is, What was the effect of this deed? Seeing (inter alia) that it recites the deed of May 30, 1853, it did not, of course, in itself prevent the owners for the time being of the green estate from being liable, at the instance of the original vendor or of the assigns of the other parts of the general estate governed by the original scheme and restrictions, to obey such schemes and restrictions if insisted on. But I think the deed of June 14, 1853, created a sub-scheme which, though not binding on others interested, did bind all those who were parties to it and their assigns with notice. In other words, I think the owners for the time being of the green estate as between themselves, and themselves only, were governed by their sub-scheme and by their sub-scheme only, and in particular could not enforce as between themselves the restrictions of the original covenant where those were stronger than or different from the restrictions imposed by the covenant in the deed of June 14, 1853. It follows that, though the plaintiff Knight can enforce against the defendant the original covenant of the deed of May 30, 1853, yet the plaintiff Williams, being himself an assign of part of the green estate and bound by the covenant of June 14, 1853, can only enforce against the defendant the last-mentioned covenant. Now the defendant is admittedly carrying on the business of a laundryman, and is breaking the original scheme and covenant, and can therefore be restrained at the instance of the plaintiff Knight, subject to my consideration of the further points taken by the defendant which I have hereafter to consider; but the plaintiff Williams, to entitle him to an injunction, must shew that this business of a laundryman is a breach of the covenant contained in the deed of June 14, 1853. In my opinion, on the evidence, he fails to shew this. I am satisfied that the business is not "noisy, noxious, dangerous, or offensive" within the meaning of those words as used in the covenant. Nor is it "injurious to the land" (i.e., the green estate) "or any part thereof." The plaintiff Williams,

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however, urges that it ought to be held injurious to his house and grounds even though it does not directly injure them, because from the mere fact of its being a business it tends to lower the general character of the estate as a residential one. Now, in my opinion, the words at the end of the covenant I am now considering, looking at the covenant as a whole, are intended to apply and should be construed as applying to a direct injury only. But even if I am wrong in this, and the word "injurious" is to have the larger meaning, it is clear from the whole tenor of the covenant that it is not every business that is prohibited by the words in question, but only such businesses as are injurious from their special nature or from the particular way in which they are carried on. Now the defendant's laundry business is not in my opinion, on the evidence before me, one which from its special nature or from the way in which it is carried on tends to lower the character of the estate or to injure the property of the plaintiff Williams either directly or indirectly, and, this being so, I think the claim of this plaintiff to stop the business fails.

I have now to consider the remaining points raised by the defendant as an answer to the claim of the plaintiff Knight to stop the carrying on of the laundry. The defendant contends that the estate has so changed from its original residential character, and that the original scheme has been so departed from on this part of the estate, that it would be inequitable now to enforce the scheme and original covenants as against the defendant. And further, he contends that, in any case, so many businesses (especially laundry businesses) have been carried on upon this part of the estate, and for so long a time, that the plaintiff ought to be now held precluded by acquiescence or otherwise from any right he might otherwise have had to restrain him. In my opinion, on the evidence, the defendant fails to establish any such case as would enable the Court to uphold either of these contentions. Notwithstanding the evidence of several of the defendant's witnesses, I am satisfied that this part of the estate, like the rest of it, has continued to be and is still practically a residential one. Nor has the original scheme been so departed from as to render it

inequitable that it should now be enforced at the instance of the plaintiff Knight. All the houses have been built as private houses. Looking at them from the exterior they all appear to be, and to be used as, private residences only. In no case before this action was brought was there any outward or visible sign on or about the premises to call the attention of any passer-by, or of the plaintiff Knight, to the fact that any of them were used except as private houses. At one time the defendant sought to establish that some of the houses had been built of a value below that provided for by the scheme. But in substance he failed in doing this. No doubt a few of the houses are let out in tenements to people of a comparatively humble position in life; but that was not a breach of the scheme or covenants, and could not be stopped, and, moreover, the houses so let out are so few in number that the general character of the neighbourhood and estate as provided for by the scheme has not been materially changed. The defendant has, no doubt, established that in certain of the smaller houses some laundry businesses have been carried on for a considerable time. But how have they been carried on? I must not lengthen this judgment by dwelling on all the details of the case. It will be sufficient for me to say that these laundry businesses were (speaking generally) carried on at the backs of the houses, and so quietly and unostentatiously as not to be noticeable by ordinary passers-by, or by residents on the estate whose business did not call them inside the houses. In particular, I am satisfied that the plaintiff Knight never acquiesced in any breach of the scheme or covenants by the carrying on of these businesses, and had no knowledge that laundry work was being done except such as might lawfully be done under the scheme, or was of such a trivial kind as to justify him in thinking that nothing really called for his intervention. And on this part of the case it is noticeable that such laundry businesses as were carried on were chiefly in the houses of one landlord who was outwardly desirous of supporting the scheme and covenants, and who apparently, when he let to laundrymen, took care (at any rate, in some cases) to provide for the work being done in such a way as not to call the attention of the neighbours to it.

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In other words, such breaches of the scheme and covenants as there were by reason of these laundry businesses were done secretly so far as concerns the general landowners and residents entitled to enforce the covenants, including the plaintiff Knight. Not only did these landowners and residents not acquiesce in any breach of the scheme and covenants, but there is abundant evidence before me of their care in enforcing them whenever a breach was threatened or committed to their knowledge. As to the other businesses relied on by the defendant, somewhat similar observations apply. Some few residents kept cows and sold their milk by sending it round in carts. In no case was any sale at their houses or any open carrying on of business at their houses proved to my satisfaction. If and so far as these proceedings can be called a breach of the covenants, the breach was very slight and difficult to bring home to the offenders, and I do not wonder that no proceedings were brought to stop them. I am satisfied that the general landowners and residents, including Knight, were not aware that any breach was being committed which could be proved or stopped. After what I have already said I need not dwell upon the so-called businesses of a riding-master, a carman and contractor, and a florist, as to which the defendant called evidence; for if and so far as they were trades or businesses at all in the sense of the covenants, they were of so trivial a character and so privately carried on and unknown to the landowners and general residents, including the plaintiff Knight, that they afford no real support to the defendant's contention. I need only say a few words about the remaining cases relied on by the defendant, namely, the shop kept by a Mrs. Smith for about six years ending fifteen years ago. It is noticeable that, throughout the long period from the date of the original scheme, this is the only case of a shop being kept on any part of the large area governed by the restriction I am now considering. And what kind of case is it? It is that of a general shop of a humble kind kept at the back of a house with nothing visible in front to shew its existence. It is said that at a side window a few articles were exhibited as if for sale, and that a small narrow board was put up over the side door which entered the shop stating that Mrs. Smith was

licensed to deal in certain things. But even if it could have been seen at any time from any road on the estate (which I doubt) I believe the existence of the shop, though it may have been known to some of the poorer neighbours, was not generally known on the estate, and certainly was not known to the plaintiffs. I have now dealt with all the main points relied on by the defendant in support of his contentions, and under the circumstances he, in my opinion, wholly fails to make out his case. It follows that the plaintiff Knight, but not the plaintiff Williams, is entitled to an injunction to restrain the defendant from carrying on upon his present premises the business of a laundryman now carried on by him, or any other trade or business. Something was suggested as to the motive of the plaintiffs in bringing this action; but I see no reason to doubt its being brought in good faith for the purpose of properly enforcing the restrictive covenants; and though the business of a laundryman is not in my opinion a specially objectionable one, the plaintiff Knight is clearly entitled to maintain the residential or superior character of this estate by preventing any trade or business being carried on, whether that trade or business be specially objectionable or not. Indeed, it is clear that if this defendant be not restrained, the plaintiff Knight will never hereafter be able to enforce the covenant according to its tenor, and the benefit of it will be lost to him—a benefit which appears to me to be substantial and valuable to him as the owner and occupier of his premises on this estate.

I have now dealt with the main claim of the action. There was also a claim, which it was said the plaintiff Williams could enforce, based on a back building of the defendant being above a certain covenanted height. But the excess in height was so small and the injury resulting from it so unsubstantial that this claim was not pressed. Lastly, there is a claim by both plaintiffs based on the allegation that the defendant's house is below the covenanted value. As to this, it is clear that, if the house is to be taken as one of a pair of semi-detached houses, there has been no present breach of the covenant. But if the house is to be regarded as a separate one, then it is below the covenanted value. If I thought that the house was really built as, and was

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intended permanently to be used as, a separate house, or, in other words, if I thought that it was a mere pretence on the part of the defendant to represent the house as one of a pair, then I should be prepared to enforce the covenant against him. But I do not think this is the case. The house appears to have been really built as one of a pair, having footings and chimney-breasts made ready for the companion house, and having not an exterior but a party-wall on the side where the companion house is to come. And it was built (though under a separate contract) in pursuance of a plan submitted to and approved by the local authority for the erection of a pair of houses. I do not think the defendant was bound to build the pair both together, or to let the one remain unoccupied until the other was completed. Nor can I say that such a time has elapsed since the one was built that I can infer an intention on the part of the defendant to let it remain as a separate house. What will happen if the defendant allows much more time to elapse before he completes the pair I need not now consider. It follows that the only claim which I now enforce by order is the one by Knight in respect of the laundry business, and the rest of the action must stand dismissed. With regard to costs, I think that under the circumstances justice will be done by dealing with them as follows. The defendant must pay the plaintiffs' costs of the action, except so far as those costs have been increased by the claims in respect of the height of the defendant's back building and of the value of the defendant's house and by Williams having been joined as co-plaintiff. I order the plaintiffs to pay the costs of the defendant so far only as they have been increased by the claims in respect of the value of the defendant's house, and by the plaintiff Williams being joined so far as he sought to restrain the defendant from carrying on the business of a laundryman. And I make no order as to any other costs of the action. There will be a set-off as between the costs that the parties have to receive and pay.

Solicitors for plaintiffs: *Jenkins, Baker & Co.*
Solicitor for defendant: *J. Bartlett.*

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[1895 S. 2352.]

Res judicata—Estoppel—Patent—Action for Infringement—Validity upheld —Second Action between same Parties—Validity denied on different Grounds.

In an action by a patentee claiming damages for an infringement and an injunction, the defendant denied the infringement. He also denied the validity of the patent, alleging, amongst other things, that it had been anticipated by certain specifications.

The Court upheld the validity of the patent, but granted no injunction or damages on the ground that the evidence as to the alleged infringement was, under the circumstances, not admissible. In a second action between the same parties in respect of the same patent, the defendant again denied the validity of the patent, alleging that it had been anticipated by certain specifications which were not before the Court in the first action, and which he had discovered since that action:—

Held, that the validity of the patent was res judicata, and that the judgment in the first action estopped the defendant from again denying the validity of the patent.

In 1893 the plaintiff company brought against the defendants the action of the *Shoe Machinery Co., Limited* v. *Cutlan* [1893 S. No. 4076], claiming damages for the infringement of three letters patent and an injunction. The defendants denied the infringement. They also denied the validity of the three patents on the ground (inter alia) that they had been anticipated by the various specifications mentioned in their particulars of objections. The action was tried before Romer J. in June, 1895, when the three letters patent were for convenience called patents A, B, and C. In the result his Lordship held that patents A and B were valid and had been infringed, and granted relief accordingly. His Lordship also held that patent C was valid, but that the evidence of infringement relied on was, under the circumstances, not admissible, and therefore granted no injunction, or damages, or account. The judgment as drawn up, and so far as it related to patent C, was as follows:—

"And the Court not dealing in any way with any alleged infringement of the letters patent, A.D. 1888, No. 14586

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(patent C), by the manufacture of machines made subsequent to the date of the issue of the writ in this action, and being of opinion that the alleged infringements of the said letters patent mentioned in the statement of claim and particulars of breaches were not infringements of the said last-mentioned patent, doth not think fit to make any order for an injunction in respect of the said letters patent . . . . and pursuant to s. 31 of the Patents, Designs, and Trade Marks Act, 1883, the judge doth certify that the validity of the said patents came into question." And it was ordered that it should be referred to the taxing master to tax the plaintiffs' costs of the action so far as it related to patents A and B, and so far as it relates "to the issue of validity" of patent C, and to tax the defendants' costs of the costs of the action so far as it related to the issue of infringement of patent C, and a set-off of costs was directed.

In July, 1895, the plaintiffs commenced the present action against the same defendants, and alleged by their statement of claim that the defendants had infringed patent C, and that the validity of the said patent had been established by the judgment in the first action, and they claimed an injunction and damages.

By their defence the defendants denied infringement, and they also alleged that the patent was invalid on the ground that it had been anticipated by the specifications set forth in their particulars of objections, which were not known to them until after the judgment in the first action.

This was the trial of the action.

Moulton, Q.C., Cripps, Q.C., and *W. N. Lawson*, for the plaintiffs. The only issue here is infringement. The defendants cannot contest the validity of the patent. It is res judicata. It was open to the defendants to appeal against the judgment in the first action, or they can present a petition for revocation of the patent; but the judgment in the first action estops them from raising the question of validity in this action.

Neville, Q.C., Terrell, Q.C., and *Micklem*, for the defendants. There is no estoppel here on the question of validity. An action for infringement involves the validity of a patent, and in the

first action there was no admissible evidence of infringement of patent C before the Court, and therefore the validity of the patent was not decided except for the purpose of considering the question of costs.

[ROMER J. referred to Order XXV., r. 5, and Order LXV., r. 2.]

No doubt the Court could make a declaration of validity under Order XXV.; but the plaintiffs by their pleadings did not claim a declaration of validity; they only asked for an injunction and damages. On the form of the judgment as drawn up we could only appeal on two points, namely, costs, and the certificate of validity. But an appeal does not lie for costs only, and in *Haslam Foundry and Engineering Co.* v. *Hall* (1) it was held that a certificate of validity could not be appealed against. Further, assuming the validity of the patent was decided in the first action, it was a decision on a collateral matter, and not material except for costs. The certificate of validity does not say that the patent is valid, but only that the "validity of the patent came into question," and the defendant is not precluded in a future action from denying the validity on totally different grounds, and urging that it has been anticipated by specifications which were not before the Court in the first action, and which have only been discovered since then: *Barrs* v. *Jackson* (2); *Concha* v. *Concha* (3); *Houstoun* v. *Marquis of Sligo* (4); *Heath* v. *Overseers of Weaverham* (5); *Priestman* v. *Thomas* (6); *Alison's Case* (7); *Hunter* v. *Stewart.* (8)

Moulton, Q.C., in reply.

ROMER J. In my opinion the question of the validity of the patent which is the subject of the present action is res judicata between these parties. In the former action, dealing with it only so far as it concerns this patent, the present plaintiffs alleged two things—(1.) that the patent was valid, and (2.) that there had been an infringement. The present defendants in that action challenged both points. They denied the validity

(1) 20 Q. B. D. 491.
(2) 1 Y. & C. Ch. 585, 594.
(3) 11 App. Cas. 541, 552.
(4) 29 Ch. D. 448.
(5) [1894] 2 Q. B. 108.
(6) 9 P. D. 210.
(7) L. R. 9 Ch. 1, 25.
(8) 4 D. F. & J. 168.

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of the patent on various grounds which they set forth. The issues were, therefore, bound to come before the Court for its determination; and, as a matter of fact, both the issues were fought out and determined. It is not as if the Court had refrained from determining either issue. It was in the opinion of the Court necessary, in order to do justice between the parties, that both issues should be determined—and they were determined. The Court, after hearing the evidence with great care and in detail, held, in the first place, that the patent was valid, finding that issue in favour of the plaintiffs; and, secondly, that there was no infringement which could be enforced in that action, and so accordingly found the issue of infringement in favour of the defendants. And it was on the footing of both issues having been fairly raised and determined that the Court dealt with the costs. It was because the issue of validity had been found in favour of the plaintiffs that the Court ordered the defendants to pay the plaintiffs the costs of that issue; and because the plaintiffs had failed on the issue of infringement that the Court ordered the plaintiffs to pay the defendants' costs of that issue, and declared that there should be a set-off. Now clearly, in my judgment, that decision of the Court, so far as concerns the question of the validity of the patent, and the order which directed the defendants to pay the costs of that issue, could have been appealed from. It was a deliberate finding on the question of validity—a question fairly raised for the decision of the Court as between these two parties and fairly fought out before it; and I cannot see why the decision given by the Court then on that issue is not to bind the parties to it. I would remark that it is not a case where the Court dismissed the action so far as concerned this patent merely because the patentee had failed on the issue of infringement, and, in the exercise of its discretion, had dealt with the costs. I desire to say emphatically that I dealt with the issues separately, and it was because I came to a decision on the issues that I awarded the costs. And further, in my opinion, this sufficiently appears from the words of the judgment itself. It is not necessary, in considering the question of res judicata, that there should be an express finding in terms, if, when you

look at the judgment and examine the issues raised before the Court, you see that the point came to be decided as a separate issue for decision, and was decided between the parties. It was not necessary, in my opinion, therefore, that there should be—though I agree that it might have been better if there had been—in the judgment in the case a separate declaration stating the validity of the patent: a declaration which clearly the Court had jurisdiction to put into the judgment if it had thought fit. The Order to which I called counsels' attention is clear as to that, and I need not repeat that in this case the Court did not dismiss the action with regard to the issue raised between the parties as to validity. Now I have said that, in my opinion, the issue of validity sufficiently appears from the form of the judgment itself. I will read one passage in the formal order which was drawn up, and I need scarcely point out that when my full judgment is looked at, from which the order is drawn up, the point is wholly free from doubt. The words in the order are as follows: "And the Court, not dealing in any way with any alleged infringement of the letters patent, A.D. 1888, No. 14586 (patent C), by the manufacture of machines made subsequent to the date of the issue of the writ in this action, and being of opinion that the alleged infringements of the said letters patent mentioned in the statement of claim and particulars of breaches were not infringements of the said last-mentioned patent, doth not think fit to make any order for an injunction in respect of the said letters patent." The words point in this direction—that it was only because the particulars of breaches mentioned by the plaintiffs were not infringements that no injunction was granted. The matter does not stop there, for towards the end of the judgment the Court certified as follows: "And pursuant to section 31 of the same Act (the Patents, Designs, and Trade Marks Act, 1883) doth certify that the validity of the said patent came into question." And then the matter of costs is dealt with by the order that "so far as it relates to the issue of validity of the said patent, such costs are to be taxed and paid by the defendants to the plaintiffs." It appears to me that it sufficiently appears from this judgment that I did not dismiss this action

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so far as concerns this patent, and I found the issue of validity and determined it in favour of the plaintiffs, and I ordered the defendants to pay the costs of it. I cannot doubt that if the defendants had chosen to appeal from that part of the judgment they were entitled to have had that appeal heard by the Court of Appeal.

But a further point is now taken on behalf of the defendants. It is said that they are entitled in this action to retry the question of the validity of the patent because they have discovered fresh materials for impeaching it, fresh alleged anticipations, and are entitled to have the issue of validity retried on the footing of these further materials. In my opinion they are not so entitled. If they were held to be so entitled, I do not see how there could be any finality of the questions in an action as between parties such as these. According to this contention the defendant might try his case piecemeal. He might raise such objections as he thought convenient, and when he was defeated he might then raise other points at his leisure, and might in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion the defendants are not entitled to do that. When the question of the validity of a patent is brought for trial by reason of the defendant's contesting that question, he is bound to put his whole case before the Court; and if he does not do so, then it is his own fault or his misfortune. He cannot be allowed to put part of his case, or to put his case in an incomplete manner. He is bound, when that question is raised, to search and find out all that he intends to rely upon in support of his contention that the patent is invalid. For these reasons, it appears to me that the defendants are not entitled to have this question of validity retried, because, as they say, they have found further materials which would have assisted them if they had known of them at the first trial. The plaintiffs are, therefore, right in their contention, and as between these parties the plaintiffs are entitled to say that this patent has been held to be and is valid.

[The issue of infringement was then tried, and in the result the Court held that the defendants' machine was not an infringe-

ment of the plaintiffs' patent, and dismissed the action with costs, except the costs relating to the validity of the patent which the defendants were ordered to pay, and a set-off was directed.]

Solicitors for plaintiffs: *J. H. & J. Y. Johnson, for Dennis & Faulkner, Northampton.*

Solicitors for defendants: *Sharpe, Parker, Pritchards & Barham.*

H. L. F.

AINSWORTH *v.* WILDING.

[1890 A. 1085.]

Practice—Judgment by Consent—Mistake—Setting Aside—Motion.

After a judgment has been passed and entered—even where it has been taken by consent and under a mistake—the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1.) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, Order XXVIII., r. 11, or (2.) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide—in either of which cases the application may be made by motion in the action.

Semble, that different considerations apply to interlocutory orders; but that even if a judgment has not been passed and entered the Court will not always interfere on motion, e.g., where from the nature of the ground relied on conflicting evidence is essential.

THIS action was brought by Thomas Ainsworth, claiming as a second mortgagee, and continued after his death by the trustees and executors of his will, against John Wilding, the first mortgagee, and other defendants, claiming as against Wilding an account of what was due to Wilding under his mortgage on the footing of his being a mortgagee in possession, and for redemption. The plaintiffs also claimed damages and other relief against Wilding, and as against another defendant, who was a third mortgagee, and the remaining defendant, who was the mortgagor's trustee in bankruptcy, accounts and foreclosure.

The action came on for trial before Romer J. on November 23, 1894.

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Some points in the case were argued and a witness for the plaintiffs was examined and cross-examined and after some further discussion a judgment was taken by consent of all parties.

This judgment was afterwards duly passed and entered, and contained a statement that the Court did "by consent declare" that Wilding's mortgage should stand as a security for the amount which, upon taking the accounts thereinafter declared, should be found to be due to Wilding; and that it was "by consent ordered" that certain accounts and an inquiry should be taken and made, and that it was "by consent ordered" that the accounts were to be taken "on the footing and by way of continuation" of the account delivered in a previous action of *Smith* v. *Wilding* up to October 7, 1877, and referred to in an agreement signed by Smith (who was the mortgagor), the plaintiffs to be at liberty to surcharge and falsify any of the items in the account so signed, except any items agreed to or adjusted before May 23, 1879. The judgment adjourned further consideration, and the question how the costs were to be borne, and gave liberty to apply.

On February 20, 1896, Wilding served notice of motion on the plaintiffs and the other defendants that "an order of the Court made by consent in this action on November 23, 1894, may be set aside, and that this action may be reheard on the ground that the consent of the plaintiffs and defendants to such order was given by mistake, and that such order does not express the true intentions of the parties thereto, and that in any case the consent of the defendant John Wilding to such order was given by mistake and under a misapprehension as to the true effect of such order, and that such order does not express the true intention of the defendant John Wilding, or that such further or other order may be made as to the Court shall seem meet."

Hopkinson, Q.C., and *J. G. Butcher*, for the applicant. The Court will set aside a compromise entered into by counsel under a misapprehension: *Hickman* v. *Berens*. (1) The Court of

(1) [1895] 2 Ch. 638.

Chancery could relieve a party to a suit from a decree consented to under a mistake, although the decree had been drawn up, passed, and entered: *Davenport* v. *Stafford*. (1) The power of the Court of Chancery is now possessed by the High Court of Justice, which may alter its record so as to make it conformable to the actual decision pronounced by the Court: *In re Swire*. (2) This is really like an accidental slip which the Court can correct on motion, although the judgment has been passed and entered: *Barker* v. *Purvis*. (3)

[*Frank Evans*, amicus curiæ, referred to *Huddersfield Banking Co.* v. *Henry Lister & Son* (4) as shewing that the judgment could not be set aside on motion in the action, but only in a fresh action.]

That case is inconsistent with other authorities, e.g., *Mullins* v. *Howell* (5), in which Jessel M.R. said the Court had jurisdiction to discharge a consent order made under a mistake.

[ROMER J. That was an order made on an interlocutory application.]

A compromise entered into in consequence of misrepresentation will not be enforced: *Gilbert* v. *Endean* (6); and *Huddersfield Banking Co.* v. *Henry Lister & Son* (4) shew that mistake is a ground for setting a compromise aside, notwithstanding it has been embodied in a judgment of the Court. The authorities do not shew that in no case may the application be made by motion.

[They also referred to *Emeris* v. *Woodward* (7); *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (8)]

Neville, Q.C., and *O. L. Clare*, for the plaintiffs. The case last cited was one of a third party notice. In *Emeris* v. *Woodward* (7) the order had not been drawn up. *Huddersfield Banking Co.* v. *Henry Lister & Son* (4) is directly in point. Vaughan Williams J. stated (9) that when the matter had previously been brought before him on motion he thought the

(1) 8 Beav. 503.
(2) 30 Ch. D. 239.
(3) 56 L. T. (N.S.) 131.
(4) [1895] 2 Ch. 273, 276.
(5) 11 Ch. D. 763.
(6) 9 Ch. D. 259.
(7) 43 Ch. D. 185.
(8) 34 Ch. D. 261.
(9) [1895] 2 Ch. 276.

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authorities prevented him from putting the matter right on an application in that form. That previous decision was affirmed in the Court of Appeal. (1) The point was not raised in *Hickman* v. *Berens*. (2) It is not, perhaps a question of jurisdiction, but whether an application by motion is the right way to proceed.

E. C. Macnaghten, for other defendants.

Hopkinson, Q.C., in reply.

ROMER J. This is a motion to discharge a judgment given at the trial of the action, notwithstanding such judgment has been passed and entered. The application is made in the action in which judgment was given, and the ground of the application is that the judgment, which was based on the consent of the parties at the trial, was consented to under a mistake on the part of the applicant. The respondents have raised the objection that the Court has no jurisdiction to discharge the judgment on such a motion, and that it has no longer power in this action to deal with its judgment on the ground relied upon by the applicant, and can only deal with it if a fresh action is brought to set aside the judgment. If I should overrule the objection as to jurisdiction, the parties desire to go into evidence on the motion. Speaking for myself, I am very sorry I do not see my way to overruling the objection, for I cannot but see that the effect of not doing so will be to cause considerable expense and probably some delay. I think that a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties. I have offered to hear it if all parties will consent; but the required consent has been refused. I should be glad, if the case went to the Court of Appeal, to find that my grounds for refusing the application were insufficient.

On the authorities as they now stand I have no option but to refuse the motion. The Court has no jurisdiction, after the judgment at the trial has been passed and entered, to rehear the case. That is clear. Formerly the Court of Chancery had power to rehear cases which had been tried before it even

(1) 39 Sol. J. 44. (2) [1895] 2 Ch. 638.

after the decree had been entered; but that is not so since the Judicature Acts. So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) Where there has been an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under Order XXVIII., r. 11; (2.) when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended. I am not now speaking of cases where the Court acts by the consent of the parties; I think that with consent of the parties I should have had jurisdiction, but on the authorities that is not free from doubt; and I am not speaking now of merely interlocutory orders, even if drawn up, as to which different considerations probably apply, as was pointed out by the late Master of the Rolls in *Mullins* v. *Howell*. (1) This being so, does the applicant bring his case under either of the two heads of exceptions to the rule that after the judgment has been passed and entered the Court has no power to alter it? In my judgment, the case is not within either exception. In the first place, I do not think that it would be putting a fair interpretation on Order XXVIII., r. 11, to say that the case was within that rule. It is not the case of a clerical mistake, or an error arising from an accidental slip or omission. I say that, although it is quite true that the rule would apply in a proper case where there had been a mistake of fact, on which the judgment was obviously founded. In this case I cannot, without going into evidence and really trying the matter out, decide at once that there has been an accidental slip or omission, and it is clear that this case is not within the rule. And certainly the case is not within the second exception. The judgment, as drawn up, simply expressed what the parties consented to, and contains the very words consented to, and it certainly carries out what the Court decided and intended to decide.

Having now stated the principles to be applied, I must refer to the cases cited in support of the application. The first case in point of date is *Davenport* v. *Stafford* (2); but that is not in point on this application. That case was under the practice of

(1) 11 Ch. D. 763. (2) 8 Beav. 503.

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the Court of Chancery, which had the inherent power of rehearing cases even after the drawing up and passing of the decree. That case only decided that, in the opinion of the then Master of the Rolls, the Court in the exercise of its discretion would not rehear the case, after the decree had been entered, on the ground of fraud or in similar cases, but would rehear it in the case of a mere mistake. That case has no application to the modern practice under the Judicature Acts. The next case is *In re Swire* (1), which decided that even where a judgment had been duly passed and entered it might still be altered by the Court if the Court saw that it did not truly represent the decision which the Court had pronounced or intended to pronounce.

Cotton L.J. says (2): "It is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced." Lindley L.J. says (3): "If it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not." And Bowen L.J. says (4): "An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

That case, therefore, has no true bearing upon the one before me, which is not one where it can be said that the judgment does not properly express the meaning and intention of the Court. *Mullins* v. *Howell* (5), to which I have already referred,

(1) 30 Ch. D. 239.
(2) Ibid. 243.
(3) 30 Ch. D. 246.
(4) Ibid. 247.
(5) 11 Ch. D. 763.

was a case of an order made on an interlocutory application, and that was the very ground taken by Sir G. Jessel for entertaining the jurisdiction to discharge the order. He says (1): "I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications." He also stated a further ground for his decision, namely, that the Court has a discretion as to enforcing an undertaking by attachment, and said that, being satisfied the defendant had made a mistake, he should not enforce the undertaking against him.

That case, therefore, is no authority here. *Barker* v. *Purvis* (2) was a case of an error which was corrected under Order XXVIII., r. 11. Cotton L.J. says: "That error was caused by an accidental slip, and therefore comes within the 'slip' order, Order XXVIII., r. 11," and on that ground he held that the Court had jurisdiction to set the matter right. And Bowen and Fry L.JJ. both mention the fact that the error arose from an accidental slip.

The last case is *Hickman* v. *Berens*. (3) As to that case, in the first place, the compromise there made was more in the nature of a compromise on an interlocutory proceeding, and no order was drawn up. Moreover, no objection was taken on the ground that the compromise could not be set aside on motion, but only in a fresh action; and it is clear that an objection of that kind must be taken at once, or it will be held to have been waived, as is pointed out in *Gilbert* v. *Endean*. (4) That case, therefore, is no authority for setting aside the judgment on motion.

I will say a few words as to two other cases which were cited, and which, so far as they go, are against the applicant's contention. One is *Huddersfield Banking Co.* v. *Henry Lister & Son* (5), in which Vaughan Williams J. refused to upset an order for a compromise on motion on the ground that he had

(1) 11 Ch. D. 766.
(2) 56 L. T. (N.S.) 131, 132.
(3) [1895] 2 Ch. 638.
(4) 9 Ch. D. 259.
(5) [1895] 2 Ch. 273.

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no jurisdiction to do so. When that case was before the Court of Appeal the Court did not entertain the application in its then form, but gave leave, apparently by consent, to bring an action. The action was brought, and at the trial of it Vaughan Williams J. exercised the jurisdiction to set aside the judgment in the previous action. That case is directly opposed to the applicant's contention. As to *Emeris* v. *Woodward* (1), it is not clear on the report what the exact facts were, and I cannot find whether the order had been passed and entered or not. If it had, it is clearly an authority in point and against the applicant. If it had not, then it goes beyond what the respondents ask me to decide here, for North J. held that he could not entertain an application by summons to set aside a compromise settling the whole of the action. But that case was before *Hickman* v. *Berens* (2), and I cannot say, consistently with *Hickman* v. *Berens* (2), that it would now be held that an action to set aside a compromise was necessary in every case, even although the order had not been drawn up. I cannot help thinking that if the order had not been passed and entered the Court could entertain a motion to discharge it on proper grounds. I do not say that even when the order was not drawn up the Court would always entertain a motion, and clearly I think it would not when, from the nature of the ground on which the application was based, conflicting evidence would have to be gone into or vivâ voce evidence and cross-examination would be essential. In many cases the Court might decline to set aside a compromise on motion even if it had jurisdiction to do so. So far as the authorities go, I think they support the principles I laid down at the beginning of my judgment, and I must refuse the application with costs.

Solicitors for applicant: *Robbins, Billing & Co.*
Solicitors for other parties: *Bower, Cotton & Bower.*

(1) 43 Ch. D. 185. (2) [1895] 2 Ch. 638.

F. E.

In re W. POWELL & SONS.

ROMER J.

1896

March 23.

[009 of 1892.]

Company—Winding-up—Official Receivers and Liquidators—Costs—Security—Misfeasance Summons—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

In a compulsory winding-up a small dividend only had been paid to the debenture-holders, and there was enough to pay another small dividend to them. The official receiver and liquidator took out a misfeasance summons against officers of the company, and they applied for security for their costs of the summons, the application being opposed by the official receiver and liquidator:—

Held, that the Court had jurisdiction at the hearing of the summons to make the official receiver and liquidator personally pay the costs, and that in considering whether it should do so it would have regard to the fact that he had opposed an application for security; and that on this ground the application for security must be refused, but without costs.

On May 21, 1892, Vaughan Williams J. made an order that W. Powell & Sons, Limited, should be wound up by the Court.

The company had a debenture debt of over 27,000*l.* charged or otherwise secured on all its present and future property including uncalled capital. In May, 1892, an action was commenced to enforce the debentures, and in this action a receiver of the company's assets was appointed. All the assets were realized (except the claim in respect of alleged misfeasances mentioned below) and paid to the receiver in the action, and out of the proceeds a dividend of 3*s.* 6*d.* in the £ was paid to the debenture-holders. There was also left in court enough after paying the costs of the action to pay the debenture-holders a further dividend of 1*s.* 6*d.* in the £ and no more. After payment of the dividends over 20,000*l.* would still remain owing to the debenture-holders.

In May, 1894, the official receiver and liquidator of the company issued a summons under s. 10 of the Companies (Winding-up) Act, 1890, against directors and auditors of the company, and by the summons, as amended in December, 1895, he claimed from the respondents to the summons a sum of over 48,000*l.* in respect of alleged misfeasances.

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There was evidence that certain trade creditors of the company had guaranteed payment of the official receiver's costs of the summons.

Some of the respondents to the misfeasance summons took out summonses, asking for an order that the official receiver and liquidator should give security to answer the costs of the applicants on the misfeasance summons, and that all proceedings thereon might be stayed in the meantime.

C. E. E. Jenkins, and *R. Younger*, in support of the summonses. The claim made by the misfeasance summons, if a just one, could be made either by the company in an action, or by the official receiver and liquidator by misfeasance summons under s. 10 of the Companies (Winding-up) Act, 1890. The latter course is merely a more convenient mode of procedure, and in each case the fruits of litigation go in the same way. If an action had been brought by this company, which is insolvent, security for costs would as a matter of course have been ordered under s. 69 of the Companies Act, 1862; and if one of the respondents to the misfeasance summons happened to die, an action would be necessary to make his estate liable. The applicants ought not to be in a worse position as to costs because the official receiver and liquidator avails himself of s. 10 of the Act of 1890.

It is not as if the rules as to costs were applied to official receivers and liquidators as they are applied to ordinary litigants. "If a trustee in bankruptcy is a litigant and is unsuccessful, he is made personally liable for costs; but it is not so with liquidators," who are now, if ordered to pay costs, generally only ordered to pay them out of the assets of the company: *In re London Metallurgical Co.* (1); *Salisbury-Jones and Dale's Case* (*No.* 2). (2)

Pearson J. ordered a liquidator to give security for the costs of a misfeasance summons: Form 636, Palmer's Company Precedents, 6th ed. vol. ii. p. 499. Bacon V.-C. made a similar order in *In re Seventh East Central Building Society*. (3)

(1) [1895] 1 Ch. 758, 768. (2) [1895] 1 Ch. 333.
(3) 51 L. T. (N.S.) 109.

The liquidator is not willing to admit that he is personally liable for costs, and it looks as if his name were being used to get out of all liability for costs if the misfeasance proceedings are unsuccessful. Even where he is unsuccessful, the Court sometimes declines to order him to pay costs personally, and this on the ground that he has done his duty, irrespective of the question whether the company has any assets: *In re Kingston Cotton Mill Co.* (*No.* 2). (1)

John Henderson, for the official receiver and liquidator. There is no jurisdiction to order the liquidator to give security. He and not the company is taking proceedings. Under s. 10 of the Act of 1890 the proceedings may be taken by a creditor or contributory; but in that case, in the absence of special grounds, there is no jurisdiction to order the creditor or contributory to give security.

ROMER J. I desire to express my opinion that a liquidator who initiates proceedings of this class is at the mercy of the Court as regards being ordered to pay costs at the hearing of the misfeasance summons. This Court undoubtedly has jurisdiction in a case like that to order a liquidator personally to pay costs, and in my opinion the Court would do so in any case where it would be just that the liquidator should be ordered to pay the costs. And I think that the Court, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, would have regard to the fact that an application for an order that he should give security for costs had been made and had been opposed, and that the Court had refused to order security for costs on the ground that there would be jurisdiction at the trial to order him to pay them. It is on that ground and on that ground alone that I refuse in the present case to order the liquidator to give security for costs. The applications will, therefore, be refused, but without costs.

Solicitors for applicants: *Robinson & Stannard; Cox & Lafone.*
Solicitors for official receiver and liquidator: *Dawes & Sons.*

(1) Ante, pp. 331, 350.

F. E.

C. A.
1896
March 20.

PEGGE *v.* NEATH DISTRICT TRAMWAYS COMPANY.

THIS was an appeal by the plaintiffs from a decision of North J. (1), giving leave to the Glamorgan County Council to distrain upon the goods, chattels, and effects of the defendant company. Before the argument for the appellants had concluded counsel for the Glamorgan County Council stated that their only object was to get the tramway put into good repair, and that they were willing to abstain from distraining if provision was made that all the earnings of the undertaking, after paying the necessary working expenses, should be applied in repairs. This offer was accepted, and an order was made by arrangement on the above footing.

(1) [1895] 2 Ch. 508.

H. C. J.

CHILLINGWORTH *v.* CHAMBERS.

[1883 C. 3645.]

C. A. 1895 NORTH J. *Aug.* 6, 7. C. A. 1896 *Jan.* 21, 22, 23; *Feb.* 20.

Trustee—Breach of Trust—Trustee Beneficiary—Loss to Trust Estate, Liability for—Contribution between co-Trustees—Advance of Trust Money—Repayment of Private Debt of Trustee out of Advance—Following Trust Funds.

The rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the trust estate by a breach of trust for which both are equally to blame does not apply where one of the trustees is also a cestui que trust and has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust: in that case the rule to be applied is that under which the share or interest of a cestui que trust who has assented to and profited by a breach of trust has to bear the whole loss; and the trustee who is a cestui que trust must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received.

The plaintiff and defendant, the trustees of a will, invested certain trust funds, part of the trust estate, in securities of a description authorized by the will. The plaintiff, while a trustee, became also entitled as a beneficiary to a share of the trust estate. The investments, some of which were made before and others after the plaintiff became a beneficiary, turned out insufficient, and the plaintiff and defendant were declared jointly and severally liable to make good the loss to the trust estate. The whole of the loss was made good out of the plaintiff's share of the trust estate, which share exceeded the amount of the loss:—

Held, by the Court of Appeal, Lindley, Kay, and A. L. Smith L.JJ., affirming North J., that the plaintiff had no right of contribution from the defendant in respect of any part of the loss.

The extent of the liability of a trustee beneficiary for a breach of trust in which he is implicated, discussed.

The fact of a borrower of trust money from trustees repaying out of the money so borrowed a debt due from him to one of the trustees, is not, of itself, sufficient to render the trustee so accepting repayment liable for breach of trust, the borrower of the trust money being under no restriction as to its application.

UNDER the will of John Wilson, who died on November 2, 1875, the plaintiff Chillingworth and the defendant Chambers held certain trust funds upon trust to secure an annuity to the testator's widow, and, subject thereto, upon trust for his five children equally, the share of each daughter being for her separate use. The will contained a power to invest on

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mortgage of leasehold property. One of the testator's daughters was the wife of the plaintiff Chillingworth. She died in May, 1881, intestate, and thereupon her husband became her administrator, and entitled beneficially to her one-fifth share of the trust funds.

In and after 1878 the plaintiff Chillingworth and the defendant Chambers, as the trustees of the will, advanced out of the trust funds to one James Hughes, a builder, who was being employed by the trustees to erect houses on the testator's property, various sums amounting altogether to 8650*l.*, on the security of eight mortgages of certain leasehold properties belonging to Hughes and forming part of a building estate. Four of these mortgages were made in the lifetime of Mrs. Chillingworth, namely, in December, 1878, March, 1879, August, 1879, and April, 1880; and the other four were made after her death, as to two in November, 1881, and as to the other two in March, 1883. The plaintiff Chillingworth took an active part in negotiating these several mortgages, he arranging with Chambers and Hughes the amount of each loan and the rate of interest—which was, in each case, 5 per cent.—his object being to obtain first for his wife and afterwards for himself as high a rate of interest as possible.

In 1883, shortly after the last of the above investments, this action was commenced by Chillingworth, who, besides being a trustee of the will, had then, as above stated, become beneficially entitled to his deceased wife's one-fifth of the trust funds, and by a married daughter of the testator entitled to another fifth, against Chambers, the other trustee, for the removal of Chambers from his office of trustee, and for administration of the testator's estate. The action failed so far as it sought the removal of the defendant Chambers from his office of trustee; but an order was made directing ordinary administration accounts and inquiries. The mortgages were realized in the action, and produced in all 7070*l.*, leaving a deficiency of 1580*l.*, and thereupon an order was made declaring that the plaintiff Chillingworth and the defendant Chambers were jointly and severally liable to make good that deficiency as a breach of trust, and for payment accordingly. As the result of that order,

the whole of the deficiency of 1580*l.* was made good out of the share of the testator's estate in court to which Chillingworth was beneficially entitled, and which share exceeded the amount of the deficiency.

An inquiry was then directed how and in what proportions, as between the plaintiff Chillingworth and the defendant, the loss of 1580*l.* was ultimately to be borne and paid. The chief clerk found by certificate, dated April 23, 1895, that the whole of the loss ought to be borne and paid by the plaintiff Chillingworth. This was a summons by the plaintiff Chillingworth to vary the certificate: (1.) by directing that the loss of 1580*l.* should be ultimately borne and paid by the two trustees in equal shares; (2.) in the alternative, that the plaintiff Chillingworth should be solely directed only to bear so much of the loss as accrued on the mortgages that were made after he became a beneficiary, and that the rest of the loss should be borne by the trustees equally.

It was contended before the chief clerk that, admitting the plaintiff Chillingworth to have derived a benefit from the investments through the higher rate of interest obtained, yet the defendant Chambers had himself derived a much larger advantage, inasmuch as it appeared from the evidence that Chambers had been engaged or interested with Hughes in the latter's building speculations, and had made temporary advances to Hughes from time to time without security, which advances, or some of them, were repaid to Chambers by Hughes by means of the loans made to the latter out of the trust funds. Chillingworth insisted that in this way, and without his knowledge, the trust money, or, at all events, about 1500*l.* of it, had gone into Chambers' own pocket, and that Chambers had induced him, Chillingworth, to concur in the loans to Hughes in order to have his, Chambers', advances repaid.

The summons came on for hearing before North J. on August 6, 1895.

Vernon Smith, Q.C., and *Hull*, for the plaintiff. The loss should be borne equally; unless the trustees are equally liable, where one trustee is a beneficiary, the others will have less

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motive for carefulness. The utmost that the plaintiff can be liable for is the whole of the loss occasioned in respect of the mortgages made after he became beneficiary, and one-half of the loss occasioned by the mortgages made before he became beneficiary; or at the very utmost his own one-fifth and one-half of the remaining four-fifths of the loss on the earlier mortgages; having borne the whole loss, he is entitled to contribution from his co-trustee at the very least in respect of the loss on the earlier mortgages: Lewin on Trusts, 9th ed. p. 1043; *Prime* v. *Savell* (1); *Bahin* v. *Hughes*. (2)

Swinfen Eady, Q.C., and *Tebbutt*, for the defendant. Where a beneficiary is party to a breach of trust, the consequence of which is a loss to the trust funds, the trustee is entitled to indemnity from the beneficiary to the extent of the interest of the beneficiary in the funds; and he is not the less entitled to such indemnity if the beneficiary is a co-trustee acting in the breach of trust: *Raby* v. *Ridehalgh*. (3) And this is so, notwithstanding the fact that the beneficiary only became a beneficiary after the breach of trust was committed: *Evans* v. *Benyon*. (4)

Vernon Smith, Q.C., in reply.

North J. I think that the conclusion at which the chief clerk has arrived is right, and that the motion to vary must fail. The facts are these. Mr. Chillingworth and Mr. Chambers are joint trustees, and they applied 8650*l*., part of the estate, upon investments which were unauthorized, which turned out to be deficient, and the loss upon which they are both liable to pay jointly and severally to the trust estate. The sum advanced was 8650*l*., the total loss was 1580*l*., leaving the amount received 7070*l*. I will consider how that ought to have been distributed. The beneficial interest was divisible in fifths; one-fifth of 8650*l* is 1730*l*.; therefore when the mortgages were called in each of the five cestuis que trust ought to have received 1730*l*., but there was only 7070*l*. to pay them with, which was insufficient for the purpose. Therefore the 7070*l*. ought to have been applied first of all in paying to the four persons other

(1) W. N. (1867) 227.
(2) 31 Ch. D. 390.
(3) 7 D. M. & G. 104.
(4) 37 Ch. D. 329.

than the plaintiff, who are each entitled to one-fifth, their full shares; and if there was nothing left, that fact could not have prejudiced the right of those four to be paid the full portion of their shares out of the fund. If that course had been taken, the result would have been that 6920*l.* out of the 7070*l.* received would have been paid to those four persons. That would have left a sum of 150*l.* only, and that sum only would have been available to meet the remaining one-fifth. The plaintiff would have been entitled to receive the whole of this one-fifth if the funds had been sufficient for the purpose, but there only being 150*l.*, that would have been all he could have taken out of the trust estate. That would have been the simple mode of dividing the fund at the time when it was received, but that course was not actually adopted. Both trustees of course were liable to the estate for the whole deficiency of 1580*l.*, jointly and severally, and there being a sufficient sum in court on the separate account of the plaintiff, that was applied in making good the deficiency on the shares of the other beneficiaries. The making the loss good in that way seems to me to be form and not substance; it was machinery and nothing more. The simple mode of division is that I have stated, namely, the total sum received was divisible first of all in paying those four persons who were entitled to the four-fifths in full, and the balance only to the person who was entitled to the remaining fifth. The course that was actually adopted led to a form of inquiry being directed which would not have been necessary if the funds had been dealt with in the simple way I have suggested, from the fact that I have mentioned that the loss had been provided for out of money of the trustee. The finding upon that inquiry is that the whole of the sum of 1580*l.* ought to be ultimately borne and paid by the plaintiff Chillingworth; that is to say, he is not entitled to call upon the defendant to recoup him any part of that sum. The course of events has rather disguised the simple aspect of the case, which is that which I must act upon. It seems to me that the money ought to have been divided in the proportions I have mentioned, a sum equal to four-fifths of the original trust fund going to pay those in full who had the four-fifth shares. As to the rest, all that was

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left would go to the plaintiff; but he could not be entitled to ask for anything more from his cestuis que trust. I think that is clearly settled by many cases, and I think the case of *Bahin* v. *Hughes* (1), referred to by Mr. Vernon Smith, bears that out. But then there is a circumstance I have ignored for the moment. I have treated the case as if the plaintiff had been entitled throughout to one-fifth of the whole. In point of fact, when the four first mortgages were made he was not entitled to any personal interest; he was a trustee only. The one-fifth that I have called his at that time belonged to his wife, and she afterwards dying he, as her administrator, became entitled to her fifth in those four mortgages which had been made in her lifetime. As regards those four mortgages they were made by him when he was not beneficially entitled, and it might be, in the absence of authority, that there would be a difference as to the mortgages made by him when he was a cestui que trust and those which were made by him when he was not a cestui que trust, though he afterwards became entitled under the person who at the time was a cestui que trust. As regards that point, the case of *Evans* v. *Benyon* (2) seems to me a clear authority that the fact that he did not become a beneficiary till after the breaches of trust were made cannot make any difference. At the time when the money came to be distributed he was entitled to one-fifth; and he being a trustee who concurred in the breach of trust, nothing whatever could go to him till all the other beneficiaries had been paid in full. When they had been paid in full he might take the surplus, but he could not take anything more. That being so, he cannot come upon his co-trustee and ask for any indemnity by him in respect of what has taken place. It was suggested by Mr. Vernon Smith that as trustee he might be entitled to contribution from the other. That is ignoring altogether the important fact, recognised in *Evans* v. *Benyon* (2), that he became a beneficiary afterwards, and the investment thus was made for his benefit. It was an improper investment made for the purpose of getting a larger rate of interest than otherwise could be received; and therefore in point of fact he was bound to indemnify his co-

(1) 31 Ch. D. 390. (2) 37 Ch. D. 329.

trustee to the extent to which a benefit had been received. It is not necessary now to consider the sums that he actually did receive by way of income, because the one-fifth share coming to him is larger than the actual amount of the losses, and we need not therefore go any further. But in my opinion he could only take out of the proceeds the 150*l.*, the difference between his full share and that sum. 1580*l.* is the loss that must be borne by him, and he cannot require contribution from his co-trustee. Under those circumstances the summons fails, and I must dismiss it.

D. P.

C. A.

The plaintiff appealed. The appeal was heard on January 21, 22, 23, 1896.

Warmington, *Q.C.*, and *Arnold Statham*, for the plaintiff. This is a case in which two trustees, the plaintiff and the defendant, are jointly and severally liable to make good a breach of trust. As between themselves they are in pari delicto, and entitled to contribution from one another, so that a loss for which they are equally liable may be equally borne by both of them. Though each of the trustees is liable to pay the whole, the Court will not allow the loss to fall entirely upon one of them, except under very special circumstances, as, for instance, in case one of them is a solicitor, or gets a personal benefit from the breach of trust: *Bahin* v. *Hughes* (1); *Baynard* v. *Woolley* (2); *Birks* v. *Micklethwait*. (3) *Evans* v. *Benyon* (4) was relied upon by North J. as an authority that the plaintiff in this case was not entitled to throw any part of the loss incurred upon the defendant, because the plaintiff was a beneficiary; and, no doubt, as between a mere beneficiary and a trustee, concurrence by the beneficiary in a breach of trust operates as an estoppel against him; but that has never been so held as between two trustees, where both have concurred in a breach of trust. Why should the fact that one of the trustees becomes a beneficiary after the breach of trust has been committed make any difference? How can the fact that a trustee

(1) 31 Ch. D. 390.
(2) 20 Beav. 583.
(3) 33 Beav. 409.
(4) 37 Ch. D. 329.

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happens to be a beneficiary affect the principle that, as between trustees, there ought to be contribution in respect of losses caused by a breach of trust?

[KAY L.J. Has not the Legislature, in effect, laid down, by s. 6 of the Trustee Act, 1888, that a different principle is to be applied where one of the trustees happens to be a beneficiary?]

That section, which is said to have been founded on *Raby* v. *Ridehalgh* (1), only applies where the breach is committed at the instance of a beneficiary. If a breach of trust is committed at the instance of a beneficiary, he cannot complain, and his interest is rightfully impounded to make it good: *In re Somerset.* (2) But this is not a case in which the breach of trust was committed at the instance or for the benefit of the plaintiff so as to give him more than he ought to have had. Even if the plaintiff as cestui que trust is liable to indemnify the defendant, the extent of the indemnity is, not the amount of the plaintiff's share of the trust estate, but only the amount of the benefit actually derived by him from the breach of trust: *Raby* v. *Ridehalgh.* (3) Again, *Evans* v. *Benyon* (4) is not an authority here. It turned upon the construction of the deed in that case, and the beneficiary was not a trustee. This is the first case in which the person sought to be rendered exclusively liable for a breach of trust has been both beneficiary and trustee. What is sought to be applied in this case is not a statute but an equity, and this equity ought not to be applied so as to work inequity. Can it be that if one of two trustees, who have both committed a breach of trust, induces the other to buy a sufficient share of the trust estate, the purchasing trustee becomes liable for the former joint breach of trust, and the other trustee goes scot free? Rules intended to work justice and fair dealing ought not to be so applied as to have the opposite effect; and this is a case in which there ought to be contribution. Moreover, the evidence shews that the defendant himself made, without the plaintiff's knowledge, a profit out of the breaches of trust by his building speculations with Hughes.

(1) 7 D. M. & G. 104.
(2) [1894] 1 Ch. 231, 275.
(3) 7 D. M. & G. 109.
(4) 37 Ch. D. 329.

Swinfen Eady, Q.C., and *Tebbutt*, for the defendant. Where a cestui que trust has concurred in a breach of trust he cannot himself take proceedings to render the trustee liable.

[KAY L.J. Supposing the cestui que trust obtains no benefit whatever from the breach of trust in which he has concurred, is he to pay over his share of the trust estate in order to make good the breach of trust?]

He cannot afterwards complain and make the trustees liable for what has been done with his consent. The innocent cestuis que trust must first be paid their shares: if that reduces the share of the guilty cestui que trust, he cannot take proceedings against the trustees to make good the amount by which his share has been diminished, for volenti non fit injuria. Supposing he is also a trustee, he cannot turn round and make his co-trustee liable because his share of the estate has been reduced by his own concurrence. He cannot take anything out of the estate until he has made good the loss, and he is in no different position because he happens to be a cestui que trust as well as a trustee. The rule is that the loss must first come out of the estate that contributed to it: *Trafford* v. *Boehm.* (1)

[KAY L.J. I do not see how a trustee who has concurred with his co-trustee in a breach of trust is to be exonerated out of the estate of his co-trustee. Why should he say to his co-trustee, "You shall indemnify me out of your estate"?]

The trustee cestui que trust can take nothing till the breach of trust has been satisfied.

[LINDLEY L.J. The effect of that is that he pays the whole of the loss.

KAY L.J. If both are equally liable for the loss, why should one pay the whole?]

On the principle that the first property to be resorted to in order to make good the loss is the estate of the trustee beneficiary who assented to the breach of trust. No doubt the rule is that when a breach of trust has been committed, there should be contribution as between the co-trustees; but when one of

(1) 3 Atk. 440.

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the trustees is also a cestui que trust, the loss falls primarily upon his share, for he cannot complain of a breach of trust in which he has acquiesced or concurred: *Lord Montford* v. *Lord Cadogan* (1); *Walker* v. *Symonds* (2); *Booth* v. *Booth* (3); *Fyler* v. *Fyler* (4); *Lincoln* v. *Wright*. (5)

[LINDLEY L.J. To put your argument shortly, the trustee who has no interest has a lien on the share of the trustee who has.]

That is so. The rule must now be considered as well established that, as between cestui que trust and trustee, the latter can resort to the share of the cestui que trust who has concurred in a breach of trust; and the cestui que trust cannot be in any better position because he happens to be also a trustee: *Raby* v. *Ridehalgh* (6); *Sawyer* v. *Sawyer* (7); *Evans* v. *Benyon*. (8) As regards the allegation that the defendant made a profit for himself out of the breaches of trust, the evidence shews that the plaintiff was all along perfectly cognisant of the defendant's transactions with Hughes. Upon all these grounds we submit that North J. was right.

Warmington, *Q.C.*, in reply. The defendant is bound at least to pay back what is proved to have gone into his own pocket through his building speculations with Hughes.

With regard to the cases cited on behalf of the defendant, the judgments proceeded on the grounds of the concurrence, instigation, persuasion, or authority of parties who were not trustees at all, and these parties were rendered liable for the very reason that they were not trustees. The cases are those of the gratuitous interference by a beneficiary with a trustee's duty. There the beneficiary cannot be allowed to take advantage of his own interference. But the decisions cannot be applied to such a case as the present, where the plaintiff was a trustee and was bound to act and did act as such, without any instigation or authority from other parties. We have therefore here the case of two trustees committing a breach of trust, and the

(1) 17 Ves. 485.
(2) 3 Swans. 1, 64, 75.
(3) 1 Beav. 125.
(4) 3 Beav. 550, 559, 560.
(5) 4 Beav. 427, 431.
(6) 7 D. M. & G. 104.
(7) 28 Ch. D. 595, 598.
(8) 37 Ch. D. 329.

law of the Court is that, as between them, there shall be contribution. There is no rule limiting the liability of trustees to bear the burden of a breach of trust rateably.

Cur. adv. vult.

1896. Feb. 20. LINDLEY L.J. stated the circumstances under which the mortgage investments were made, pointing out that the investments were not unauthorized by the will and were not themselves breaches of trust. His Lordship then proceeded :—

The plaintiff favoured these loans to Hughes both when his wife was alive and after her death, because Hughes was willing to pay, and did pay, 5 per cent. interest. On the other hand, it is proved that the defendant was mixed up with Hughes in building operations and was interested in them, and that after the trustees had agreed to make an advance to Hughes the defendant frequently made him a temporary loan, intending that it should be repaid by Hughes as soon as he got money from the trustees, and it is proved, and in truth admitted by the defendant, that these temporary loans were so repaid. The amounts, however, of these temporary loans and repayments cannot now be accurately ascertained. They probably amounted to considerably more than 1500*l.* The plaintiff asserts that he knew nothing about these loans and repayments until quite lately ; and his counsel contended that the defendant ought to be treated as having received the trust money himself to the extent of at least 1580*l.*, and that the defendant was in strictness liable to make good the whole of the loss sustained by the trust estate, but that the plaintiff was content with one-half and did not ask for more. On the evidence, however, I am not satisfied that the plaintiff was so ignorant of these loans and repayments as he now says he was. No hidden scheme on the part of the defendant to get the moneys ostensibly for Hughes but really for himself is made out. Under these circumstances the repayments of the defendant's advances cannot be regarded as breaches of trust. Hughes was a mere borrower of trust money. His liability as regards the trust money lent to him was simply to repay it with interest. This was settled in

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Stroud v. *Gwyer* (1) and *Vyse* v. *Foster*. (2) He therefore could pay the trust money away after he had borrowed it to any one, and no one taking it from him, even with notice of the source from which he obtained it, would incur any liability to the trustees who lent it, or to their cestuis que trust: see *Butler* v. *Butler* (3), where the liability of persons dealing with borrowers of trust property is discussed. It is impossible, therefore, to treat the defendant as liable to make good the whole or even half of the loss on any such theory as that to which I am now referring.

But although the defendant is not bound to indemnify the plaintiff against the whole loss, it has to be considered whether the plaintiff is not bound to indemnify the defendant. I am not now alluding to the plaintiff as a cestui que trust. I will consider his position in that character presently. I am regarding him simply as a co-trustee. It sometimes occurs, though not often, that one co-trustee is bound to indemnify the other against all loss. Whether he is or is not depends on what is just, as between the two, and this depends on what they have respectively done: see *Bahin* v. *Hughes* (4), and the cases there cited.

Now, in the present case, the improper investment which led to the loss was made, so far as the plaintiff was concerned, in order to obtain a high rate of interest for the benefit of his own wife so long as she lived, and for the benefit of the plaintiff himself after her death. If, then, the defendant had not been interested in procuring advances for Hughes it would require consideration before holding it to be just, as between the plaintiff and the defendant, to throw any part of the loss upon the defendant. In the case supposed, the defendant would have strong grounds for contending that he was entitled to be indemnified against all loss by the plaintiff. It is, however, unnecessary to decide how this would have been; because, although no such scheme on the part of the defendant as I have before alluded to is proved, yet it is proved that the defendant was interested in keeping Hughes afloat and in

(1) 28 Beav. 130.
(2) L. R. 8 Ch. 309.
(3) 7 Ch. D. 116, 119.
(4) 31 Ch. D. 390.

facilitating borrowing by him: and I cannot avoid the conclusion that the plaintiff and the defendant, for personal reasons of their own, although for different ends, were both ready to run risks which, as trustees, they ought not to have run, and were too lax in seeing after the sufficiency of the securities they took. As between the plaintiff and the defendant, therefore, if the plaintiff had no beneficial interest in the estate, the ordinary right of one trustee to contribution from his co-trustee would exist.

Having arrived at this conclusion it is necessary to consider what the effect is of the circumstance that the plaintiff became entitled to his wife's one-fifth share in the trust estate when she died. The plaintiff contends that if two trustees are jointly and severally liable to make good a breach of trust, and are as between themselves in pari delicto, they are, as between themselves, entitled to contribution so as to equalise the loss to which both are equally liable. The plaintiff further contends that the fact that on the death of his wife he became beneficially entitled to a share of the trust property does not deprive him of his right to contribution from his co-trustee. On the other hand, it is contended by the defendant that a cestui que trust who concurs or acquiesces in a breach of trust cannot obtain any relief against his trustee. The defendant further contends that this principle applies, not only when the cestui que trust is not himself a trustee, but also when he is; and that the same principle applies even although the person filling both characters does not become a cestui que trust until after the breach of trust has been committed.

North J., in his judgment, first pointed out that, as between the beneficiaries, the plaintiff's share was primarily applicable and had properly been applied to make good the loss arising from the breach of trust, and then he held, on the authority of *Evans* v. *Benyon* (1), that the plaintiff was precluded from throwing any part of that loss on the defendant. *Evans* v. *Benyon* (1), however, was not a case of co-trustees at all. The Court did decide that a person who instigated a breach of trust could not, when he himself became a beneficiary,

(1) 37 Ch. D. 329.

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compel the trustees to make good the loss occasioned by such breach. It is, therefore, an authority for saying that if the plaintiff had not been himself a trustee his conduct before he became a cestui que trust would have precluded him from obtaining relief against the defendant in respect of the breach of trust which the plaintiff concurred in, as above stated.

In order to determine the rights of the parties it is necessary to consider—first, the plaintiff's right in his character of trustee against the defendant; and, secondly, the defendant's right against the plaintiff in his character of cestui que trust. To the extent to which the plaintiff's right as trustee is neutralized by his obligation as cestui que trust he will have no right to contribution. But except so far as it is thus neutralized his right to contribution will remain. In other words, if the plaintiff as trustee is entitled to throw half the loss on the defendant, and if, on the other hand, the defendant is protected against any claim of the plaintiff in respect of his share of the trust estate, then, as that share exceeds half the loss, the plaintiff will not be entitled to anything from the defendant, and must bear the whole loss which he has sustained. On the other hand, if the plaintiff as cestui que trust is not precluded from recovering from the defendant so much as one-half the loss, the plaintiff's right as co-trustee to contribution from the defendant will still be enforceable for the excess. This, in my opinion, is how the conflicting rights of the two parties have to be adjusted, and it only remains to work them out.

The plaintiff and the defendant being in pari delicto, the plaintiff's right as trustee to contribution from the defendant as co-trustee to the extent of one-half the loss is established by a long series of authorities, of which it is only necessary to mention *Lingard* v. *Bromley* (1) and *Bahin* v. *Hughes*. (2) On the other hand, the right of the defendant as trustee to be indemnified out of the share of the plaintiff as cestui que trust against the consequences of a breach of trust committed at his request and for his benefit is equally indisputable. It was treated by Lord Eldon as clear law in his day that a cestui que trust who concurs in a breach of trust is not entitled to relief

(1) 1 V. & B. 114. (2) 31 Ch. D. 390.

against his co-trustee in respect of it: see *Walker* v. *Symonds*. (1) In Lewin on Trusts, 8th ed. p. 918; 9th ed. p. 1053, many other authorities will be found to the same effect; and Lord Eldon's statement of the law was distinctly approved and followed in *Farrant* v. *Blanchford*. (2) Moreover, as already pointed out, it was decided in *Evans* v. *Benyon* (3) that this doctrine applies to a person who becomes a cestui que trust after his concurrence. Further, in *Butler* v. *Carter* (4) Lord Romilly stated distinctly that where one of two trustees was himself a cestui que trust he could not call upon his co-trustee to replace stock which they had both permitted to be misapplied.

These cases are all based on obvious good sense; for if I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw that loss on him. Whatever our liabilities may be to other people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property, or have only a share or a limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him. This rule is eminently just in such a case as this, in which the plaintiff, who seeks relief, has concurred in a long series of breaches of trust, and has, since he became a cestui que trust, confirmed all the breaches of trust which he and the defendant committed at an earlier period.

The plaintiff contended, on the authority of *Raby* v. *Ridehalgh* (5), that the plaintiff's liability as cestui que trust to indemnify the defendant, and the extent of the plaintiff's inability to obtain relief against the defendant, was limited, not by the amount of the plaintiff's share in the trust estate, but by the benefit derived by the plaintiff from the breach of trust. But I do not understand *Raby* v. *Ridehalgh* (5) to go as far as this. The question there was to what extent two tenants for life were bound to indemnify their trustees in respect of certain breaches of trust. The master found that the tenants for life

(1) 3 Swans. 1, 64.
(2) 1 D. J. & S. 107.
(3) 37 Ch. D. 329.
(4) L. R. 5 Eq. 276, 281.
(5) 7 D. M. & G. 104.

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had benefited by these breaches and had requested the trustees to invest the trust money on mortgage, but that the two tenants for life had not instigated or authorized the particular investments which led to the loss which the trustees were ordered to make good. The Vice-Chancellor held each of the tenants for life personally liable for the whole loss. The Court of Appeal corrected this, and decided—first, that the liability of the tenants for life was not a personal liability to indemnify the trustees, but was confined to the beneficial interests of the tenants for life; and the Court decided, secondly, that the liability of the tenants for life was limited to the amounts they had respectively received, and did not extend to what other tenants for life had received, nor to what the trustees had not paid over to any one. This, under the circumstances of that case was quite right. The whole of the life interests of the tenants for life were, however, charged with the repayment of what they were held liable for. In varying the order appealed from, the Court of Appeal treated the corrections which it made as formal rather than substantial, and I do not understand the decision to go further than I have stated; nor is there any reason to suppose that the doctrine as laid down by Lord Eldon was in any way considered incorrect. Suppose a cestui que trust in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other cestui que trust compels them to make the loss good? I apprehend not; and yet, in the case supposed, the cestui que trust in remainder might not himself have derived any benefit at all from the breach of trust. The 6th section of the Trustee Act, 1888 (51 & 52 Vict. c. 59), appears to be based on this view of the law, and under that section (if it applied) it would, in my opinion, be just to impound the whole of the plaintiff's beneficial interest to indemnify the defendant.

On these grounds I am of opinion that the decision appealed from is right and that the appeal must be dismissed with costs.

KAY L.J. A claim is made by the plaintiff, one of two trustees, against the defendant, his co-trustee, for contribution of one-half the loss occasioned by a breach of trust committed by both by investing part of the trust money on insufficient security.

When trustees are equally to blame for a breach of trust, and are made jointly and severally liable to the cestui que trust if one of whom pays the whole, his right to enforce contribution from his co-trustee is clear.

In *Lingard* v. *Bromley* (1) Sir W. Grant M.R. distinguished such a case from an ordinary tort, and had no doubt about the right to contribution. He there said: "There are, no doubt, many cases, in which persons may be all liable, severally as well as jointly, to indemnify a third party; and yet ought not in equity to bear the burthen equally among themselves." The plaintiff and defendant in that case were assignees in bankruptcy, and the Master of the Rolls points out that the plaintiff, who had filed the bill to obtain contribution, had not derived any exclusive benefit from the breach of trust, and that the defendants were not excused, because they had left the matter in the plaintiff's hands and did what he desired without examining into the matter. This was followed by the Court of Appeal in *Bahin* v. *Hughes*. (2) The care with which the Court in administering equity between the trustees looks into all the circumstances is illustrated by *Lockhart* v. *Reilly* (3), where a loss was occasioned by an improper investment on mortgage made by two trustees, one of whom was a solicitor and acted as solicitor in the matter, and negotiated the mortgage in favour of a mortgagor with whom he was connected. Lord Cranworth L.C. held him to be primarily liable as between himself and his co-trustee, and said that the fact of his acting as solicitor would not alone be sufficient to justify this result. The same thing was held in *Thompson* v. *Finch*. (4)

It seems to be essential to this claim for equal contribution that the trustees should be equally to blame for the breach of trust, and that neither of them should have derived an exclusive

(1) 1 V. & B. 117.
(2) 31 Ch. D. 390.
(3) 25 L. J. (Ch.) 697.
(4) 8 D. M. & G. 560.

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benefit from the breach of trust. [His Lordship then stated the facts of the case, and proceeded:—]

The whole of the loss, 1580*l.*, has been recouped out of the plaintiff's share of the testator's estate. He seeks now to charge his co-trustee with 790*l.*, being one-half the amount which has been so paid. The plaintiff was interested, at first through his wife and afterwards personally, in making these investments. Some of them were in existence at the death of his wife, and since her death he has been personally entitled to her share, and some of the investments have been made since. He has maintained in this litigation that they were proper investments. He derived a benefit from the breach of trust, and if the co-trustee did not, the plaintiff, according to *Lingard* v. *Bromley* (1), would be primarily liable as between himself and his co-trustee.

But then it is argued that he did not derive an exclusive benefit, but that the defendant took another and much larger advantage. The case was opened as one in which the defendant was engaged with Hughes in his building speculation, and made advances to him from time to time without security, and that this was unknown to the plaintiff, and that the defendant induced the plaintiff to concur in lending the trust money to Hughes in order that Hughes might repay to the defendant, out of such moneys, the amount due to the defendant; and that Hughes in fact did so, and that the trust money went into the pocket of the defendant. On the other hand, it was not denied that Hughes did pay some of the moneys he so received to the defendant, but it was said, only advances made by the defendant to Hughes when a loan from the trust estate had been agreed on, and such advances were made in anticipation of the actual loan.

The evidence is not clear on the point. [His Lordship then reviewed the evidence on this point, and proceeded:—]

I cannot resist the conclusion that Chillingworth was aware that Chambers was a creditor of Hughes when the mortgages in question, or some of them, were made, and that he knew that the money borrowed was, sometimes at any rate, applied by Hughes in payment of his debts to Chambers.

(1) 1 V. & B. 117.

In *Butler* v. *Butler* (1) one trustee filed a bill against another claiming to make him primarily liable for a deficiency of mortgages made to a builder who repaid to the defendant trustee a large part of such moneys for debts due from him to such trustee for the purchase-money of the land, and on account of advances made by him to the mortgagor. The plaintiff was aware that some payments were so made, but he did not know the amount. Fry J., before whom the case first came, asked if there was any case in which such an indirect benefit had been held to make the trustee who received it primarily liable, and refused to do so; and this was supported in the Court of Appeal, James L.J. saying that, in the absence of fraud, such a claim was too remote.

Suppose, then, that the plaintiff was thus directly or indirectly interested in lending the trust money to Hughes, and must be treated as having exclusively benefited by the breach of trust, the question is whether he is primarily liable to the extent of his one-fifth share of the estate. It was argued that all the estate recovered must first be applied to pay the other four-fifth shares, and that the plaintiff has no right to contribution for the deficiency to pay his share.

In *Trafford* v. *Boehm* (2) trust funds were settled by a marriage settlement (3) on husband for life, wife for life, and then for children, and if none, to the husband. With the concurrence or subsequent consent of the husband an improper investment was made of the trust fund, which resulted in a loss; and after the death of the husband his widow filed a bill against the trustees of the settlement to recover the trust fund. The surviving trustee of the settlement filed a cross bill to be indemnified against the loss. Lord Hardwicke held that the estate of the husband was primarily liable. He said (4): "The rule of the Court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the cestui que trust, it must be made good first out of the estate of the person

(1) 5 Ch. D. 554; on appeal, 7 Ch. D. 116.

(2) 3 Atk. 440.

(3) Ibid. 442.

(4) 3 Atk. 444.

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who consented to it." That this is the rule in the case of a person, cestui que trust at the time, assenting to a breach of trust, is established by dicta, at least in many cases. I take as an example Lord Langdale's words in *Lincoln* v. *Wright* (1): "Nothing can be more clear than the rule which is adopted by the Court in these cases: that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the Court does, in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."

In *Walker* v. *Symonds* (2) Lord Eldon said: "It is established by all the cases, that if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand, to secure the property of the cestui que trust; and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude." This refers only to an attempt by the cestui que trust to make the trustee liable for any loss which the cestui que trust may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust. But, as I have shewn, this estoppel does not exist when the claim is for contribution by one trustee against another. The fact of the claimant being equally to blame for the breach of trust does not bar such a claim.

(1) 4 Beav. 432. (2) 3 Swans. 64.

Then, what difference does it make that the trustee so claiming is also interested in the trust estate? If he takes no benefit directly or indirectly by the breach of trust, can his interest be laid hold of to indemnify his co-trustee? If he does benefit, is the whole of his interest liable, or only to the extent of the benefit received? The decisions and dicta on this question are not easy to reconcile.

In *Booth* v. *Booth* (1), where the testator's widow, who was entitled to the income of the residue till his youngest child attained twenty-one, concurred in a breach of trust by the trustees carrying on the business of the testator whereby his capital in that business was ultimately lost, Lord Langdale said (2): "That the widow concurred seems to be quite clear; and any interest to which she may be entitled is the proper fund to resort to in the first instance. If she has obtained any benefit from the breach of trust, the trustee ought to be compensated in respect of it." That seems to indicate a limitation of the liability to the amount of the benefit derived by the beneficiary.

The question came before the Court of Appeal, and seems to have been carefully considered, in *Raby* v. *Ridehalgh* (3), where tenants for life of equal half shares in the trust estate induced the trustees to lend the trust money on mortgage so as to secure a higher rate of interest than the public funds in which the trustees desired to invest. There were no powers of investment in the will creating the trust. The tenants for life did not request the trustees to invest on the particular mortgages which turned out deficient. The trustees were held liable for the loss, and it was declared by the original order that the life interest of the tenants were liable to recoup the trustees in terms which would make such life interest liable to its full extent, and each also liable for the whole deficiency. On appeal, Turner L.J., intimating that the Court did not go the length of ordering the cestuis que trust personally to recoup the trustees, and doubting whether the trustees had any power to invest on mortgage, and holding the trustees liable, continued thus (4):

(1) 1 Beav. 125.
(2) Ibid. 130.
(3) 7 D. M. & G. 104.
(4) Ibid. 109.

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"The next question is, what is the extent of liability which attaches upon the cestuis que trustent for life in consequence of their having induced the trustees to commit the breach of trust?" He then points out that they had received the income of the improper investments, and that the trustees were entitled to stand in the place of the remaindermen, "for the purpose of recovering against the cestuis que trustent for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust." One tenant for life, John Spencer Raby, was living, the other, William Raby, had died since the institution of the suit. The decree was altered, and, as altered, declared that J. S. Raby, and the estate of W. Raby, were respectively liable, to the extent of the interest on the mortgages received by them respectively, to make good to the trustees the amount they had to pay, and that the life estate of J. S. Raby, and what was due in respect of the life estate of W. Raby, were respectively liable to pay the amount for which each of them were respectively so liable. Turner L.J. expressly treats the tenants for life as having instigated the breach of trust, and particularly pointed out that the life interest of each cestui que trust ought not to be made liable for the whole, but each estate only for so much of the income of the improper investments as each tenant for life had respectively received. If these receipts were not sufficient to recoup the trustees in full, it would seem that the Court considered that the rest of the loss must be borne by them; and this was the effect of the decree as altered.

Here we have a plaintiff who was both trustee and also cestui que trust as to one-fifth of the property; and, if the cases I have referred to apply, it follows that he is not estopped by his concurrence in the breach of trust from claiming contribution. But as cestui que trust he is prevented from requiring the trustees to make good any loss sustained by him in that character. The loss he seeks to make his co-trustee share is not the loss of his one-fifth share as cestui que trust, but the amount he has had to pay as trustee to recoup the deficiency of the trust estate. If he is primarily liable to the extent of his one-fifth share, this claim must fail. If liable only to the

amount of the benefit received from the improper investment, the balance of the loss, after deducting that amount, should be shared by himself and his co-trustee.

On the whole, I think that the weight of authority is in favour of holding that a trustee who, being also cestui que trust, has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust, must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received. I think that the plaintiff must be treated as having received such an exclusive benefit.

I am of opinion, for these reasons, that the plaintiff's action fails, and the appeal must be dismissed.

It is said that s. 6 of the Trustee Act, 1888, does not apply to this case; I suppose, because this proceeding was pending at the passing of that Act. The statute does not define the extent of the liability of a concurring beneficiary. The 6th section is rather addressed to describe the case in which the Court may, if it shall think fit, impound all or any part of the interest of the beneficiary by way of indemnity to the trustee, and also to provide that consent of a beneficiary for this purpose must be given in writing.

A. L. SMITH L.J., after stating the facts, proceeded:—There appear to be three rules which have application to a case like the present, and may be shortly stated as follows: (1.) that a cestui qui trust cannot make a trustee liable for losses occasioned to him by a breach of trust which that cestui que trust has authorized and consented to; (2.) that in such a case a trustee is entitled to be recouped out of the interest of the cestui que trust in the trust funds any loss he may sustain by reason of his having to make good such breach of trust; and (3.) that, as between two trustees who are in pari delicto, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other.

The question is how these rules are to be applied in the present case.

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As to the existence of the 1st rule, Lord Eldon, as long ago as the year 1818, in *Walker* v. *Symonds* (1), states: "It is established by all the cases, that if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust." And in 1841 Lord Langdale, in *Fyler* v. *Fyler* (2), states the rule as follows: "If all this has taken place"—that is, the breach of trust—"with the consent of the parties now complaining, it certainly appears to me that they would not have any right to maintain this suit, for volenti non fit injuria. If they have authorized this course of dealing with their own fund, it would be in the highest degree unjust, to permit them to establish a claim against those who have acted under their authority."

As to the 2nd rule, this was held by Lord Hardwicke in the year 1746, in *Trafford* v. *Boehm* (3): "The rule of the Court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the cestui que trust, it must be made good first out of the estate of the person who consented to it." And Lord Langdale, in *Lincoln* v. *Wright* (4), states the rule thus: "Now, nothing can be more clear than the rule which is adopted by the Court in these cases: that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted, personally, to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the Court does, in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."

The judgment of Turner L.J., in *Raby* v. *Ridehalgh* (5), appears to me to proceed upon the same principle, for he

(1) 3 Swans. 64.
(2) 3 Beav. 560.
(3) 3 Atk. 444.
(4) 4 Beav. 432.
(5) 7 D. M. & G. 104.

held cestuis que trust who had been privy to and instigated a breach of trust liable out of the trust shares to recoup the trustees.

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A question has arisen under this judgment as to what amount of the cestui que trust interest the trustee is entitled to impound.

For the reasons given by Lindley L.J., I am of opinion that Turner L.J. did not intend to cut down the rule which had theretofore, in my opinion, existed, namely, that a trustee may be entitled to impound the cestui que trust's interest in so far as it will go to recoup him for the losses he has had to make good. It is not stated whether the amount impounded in this case was not sufficient to indemnify the trustee.

A. L. Smith L.J.

I do not doubt, had the plaintiff in the present case not been a co-trustee with the defendant, but only a cestui que trust of the estate of which the defendant was trustee, that, inasmuch as the plaintiff had authorized and consented to the breach of trust which is now complained of, he could not have claimed contribution from the defendant to make good the loss he had sustained; and, what is more, that the defendant would have been entitled to impound the plaintiff's interest in his one-fifth share to exonerate him from any loss he might have been called upon to make good by reason of the breach of trust.

[His Lordship then considered the evidence upon the question whether there had been any concealment from the plaintiff on the part of the defendant of the fact that Hughes, out of the advances made to him out of the trust funds, repaid the temporary loans made to him by the defendant, and held that no concealment has been established against the defendant, and that the plaintiff was well aware of the circumstances under which the advances of the trust funds were made. His Lordship then proceeded:—]

It appears to me that the truth as to the motives of the plaintiff and the defendant is that the plaintiff was desirous of obtaining a higher rate of interest for his wife and afterwards for himself than he otherwise would have obtained had the trust funds not been lent to Hughes upon mortgage; and that the defendant was desirous that Hughes should have the trust money advanced to him upon mortgage, for it bettered his

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chance of being paid by Hughes that which Hughes might owe to him.

I now come to the 3rd rule, which is, that, where two trustees concur in committing a breach of trust and are in pari delicto, the one, if he has made good the loss occasioned thereby to the trust estate, can obtain contribution from the other. The existence of this rule is not disputed at the bar: see *Lingard* v. *Bromley*. (1)

The real question is, how is this rule to be applied in the present case, which arises, not between two trustees who are merely trustees, but between a trustee who is also a cestui que trust and his co-trustee who is not?

In my judgment, the true view is that the plaintiff in this case can only bring into play the 3rd rule (that is, the rule as to contribution between co-trustees) if and when he has made good to the cestuis que trust any loss they have sustained by reason of the breach of trust complained of over and above his share in the trust property; but this he has not done.

As before stated, if he had not made good this loss, and the defendant had, the plaintiff's share could have been impounded for that purpose by the defendant until he had been recouped what he had paid; and the plaintiff, therefore, is not in a position to ask for contribution from the defendant until the plaintiff had paid more than the amount of his share. When he had done so, then, it seems to me, he would have been entitled to ask for contribution towards what he had paid over and above his interest in the trust funds. But there yet remains to the plaintiff of his share in the trust funds the sum of 150*l*., and, consequently, in my judgment, there is nothing upon which the plaintiff can bring into play the operation of rule 3.

For these reasons, I think that North J. was quite right in deciding as he did, that the plaintiff was entitled to no contribution from the defendant. This appeal must be dismissed.

Solicitors: *Geo. Brown, Son & Vardy; Bramall, White & Sanders.*

(1) 1 V. & B. 114.

G. I. F. C.

In re HOLT & CO.'S TRADE-MARK.

C. A. 1895 NORTH J. *Nov.* 29, 30. C. A. 1896 *Feb.* 28; *Mar.* 3, 16.

Trade-mark — Registration — Name — Fictitious Person — "Word" — Patents, Designs, and Trade Marks Acts, 1883 *and* 1888, 46 *&* 47 *Vict. c.* 57, *s.* 64; 51 *&* 52 *Vict. c.* 50, *s.* 10.

A fictitious name, such as the name of a character in fiction, is a "word" capable of being registered alone as a trade-mark under sub-s. (*e*) of s. 10 of the Patents, Designs, and Trade Marks Act, 1888: *Per* C. A. (Lindley and A. L. Smith L.JJ., Kay L.J. dissenting), reversing decision of North J.

On July 26, 1895, Messrs. Holt & Co. applied for leave to register the word "Trilby" in class 38 of the Board of Trade Rules under the Patents, Designs, and Trade Marks Act, 1883, for gloves, ladies' blouses, and ladies' aprons. The application was duly accepted, and the comptroller-general issued his certificate of registration on November 2, 1895. At the time of registration the word was well known as the name of the heroine of a popular novel and drama, the full name of the heroine being Trilby O'Farrell. The first part of the novel was published in this country in *Harper's Magazine* in December, 1893. It was afterwards dramatised.

Messrs. Holt & Co. instituted an action against Messrs. Saunders, Green & Co. to restrain the use by the defendants of the name "Trilby" as applied to ladies' aprons not of the plaintiffs' manufacture.

Messrs. Saunders, Green & Co. now moved to rectify the Register of Trade Marks by removing Messrs. Holt & Co.'s trade-mark "Trilby" therefrom. There was evidence that the word had been registered as a trade-mark by a number of other persons in connection with other goods.

The motion came on for hearing before North J. on November 29, 1895.

Vernon Smith, Q.C., and *Kerly*, for the motion. The only heads under which it can be suggested that the word "Trilby" can be registered are those in sub-ss. (*d*) and (*e*) of s. 10 of the

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Patents, Designs, and Trade Marks Act, 1888, which replaced s. 64 of the Act of 1883. (1)

(*d*) is "an invented word." The evidence shews that at the time the trade-mark was adopted "Trilby" was a well-known word; it could not, therefore, be called an invented word; neither does it come within the terms of sub-s. (*e*) for several reasons. In the first place, the word is descriptive of the goods, and suggests the character of the apron worn by Trilby in the novel and in the play: *In re Harris's Trade-marks* (2); *Richards* v. *Butcher* (3); *Burland* v. *Broxburn Oil Co.* (4); *In re Edge's Trade-marks* (5); *In re Farbenfabriken Application.* (6) Most of these cases were under the Act of 1883; but, as has been pointed out by Lindley and Kay L.JJ. in the latter case, the 10th section of the Act of 1888 did not enlarge but restricted the scope of the 64th section of the Act of 1883.

But no proper name comes within the sub-section. The cases in which a name can be registered are provided for in sub-ss. (*a*) and (*b*), for if a name could be registered under sub-s. (*e*), sub-ss. (*a*) and (*b*) would be unnecessary: *In re Banks & James' Trade-mark* (7); *Hodgson* v. *Sinclair.* (8)

Swinfen Eady, Q.C., and *Micklem*, for the respondents, Messrs. Holt & Co. The word "Trilby" comes within the definition "an invented word." It does not matter who the inventor was; the word is recent in origin, and new as applied to aprons; therefore, under sub-s. (*d*), it is capable of registration. But it comes also within sub-s. (*e*); sub-ss. (*a*) and (*b*) are not exhaustive. It does not follow from the existence of

(1) The more material part of s. 10 is as follows:—

"(1.) For s. 64 of the principal Act the following section shall be substituted, namely:—'64 (1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars:—(*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (*b*) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or (*c*) a distinctive device, mark, brand, heading, label, or ticket; or (*d*) an invented word or invented words; or (*e*) a word or words having no reference to the character or quality of the goods and not being a geographical name.'"

(2) 9 Rep. Pat. Cas. 492.

(3) [1891] 2 Ch. 522, 536.

(4) 42 Ch. D. 274.

(5) 8 Rep. Pat. Cas. 207.

(6) [1894] 1 Ch. 645.

(7) W. N. (1895) 116; 44 W. R. 32.

(8) 9 Rep. Pat. Cas. 22.

these sections that in some cases names cannot be registered under sub-s. (*e*) : sub-s. (*b*) is limited to the name of the applicant ; sub-s. (*a*) enables names which could not otherwise be registered to be registered as printed or woven in a particular and distinctive way ; it is confined to names of individuals or firms, and does not apply to fictitious names or names which do not exist in real life.

The name "Trilby" is not in any way characteristic of an apron either in quality or otherwise. In some cases names have been allowed to be registered, and the registration has been held good by the Court : *Slazenger* v. *Malings* (1) ; *Field* v. *Lewis*. (2)

Vernon Smith, Q.C., in reply.

North J. In this case the plaintiffs Holt & Co., who seek for an injunction, have obtained the registration of a particular mark for gloves, ladies' blouses, and ladies' aprons, all being articles contained in class 38. At the foot of the certificate is set out the trade-mark, and that is a blank piece of paper with the word "Trilby" printed in the middle of it in most ordinary type. That is what the plaintiffs have registered, and that is what the defendants seek to expunge from the register. I do not think it is properly registered according to the true construction of the Act of 1883, s. 64, as amended by the Act of 1888. That section provides that "a trade-mark must consist of or contain at least one of the following essential particulars :— (*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner." Now this word "Trilby" is not printed in any particular or distinctive manner at all within the sub-s. (*a*) ; nor is it within sub-s. (*b*), for it is not "a written signature" at all. Nor is it within "(*c*) A distinctive device, mark, brand, heading, label, or ticket." It is not that. Then we come to (*d*) and (*e*) : (*d*) being "an invented word or invented words" ; and (*e*) "a word or words having no reference to the character or quality of the goods and not being a geographical name." Now it is said in the present case the word "Trilby" comes under (*d*) or (*e*) as being

(1) W. N. (1885) 124. (2) Seton on Judgments, 5th ed. p. 537.

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an invented word, or a word which has no reference to the character or quality of the goods, and is not—as it clearly is not—a geographical name. [His Lordship stated the facts before him, and proceeded:—]

It was suggested, but I think only faintly suggested, that the word "Trilby" was an invented word. I think it quite clear that it was not an invented word within the meaning of the 64th section of the Act, sub-s. (*d*). To begin with, it is not claimed to be such. No one suggests in the affidavits that it was an invented word, and I have no history of the invention of it; and I take it to be quite clear from the "Somatose" case (*In re Farbenfabriken Application* (1)), from the judgments of all the Lords Justices, that the word "Trilby," becoming widely known from the end of 1893, could not be said to be an invented word in the month of July, 1895. What they all considered was that there must be something novel about it: something new. I think that "Trilby" in July, 1895, had nothing whatever new about it. I think it clear, therefore, it was not an invented word.

Then the sub-s. (*e*) is more difficult to deal with: "A word or words having no reference to the character or quality of the goods and not being a geographical name." That last we may put out of the case, because of course "Trilby" is not that; but then, is it a word "having no reference to the character or quality of the goods"? Can it be said that the word "Trilby" has a reference to the character or quality of the goods? I cannot see that it has. I do not see how "Trilby" represents the character or the quality of an apron or of a pair of gloves; and I have no evidence before me suggesting in what way the word can represent either character or quality. I have no evidence going to that point at all. I do not see what one can learn as to either character or quality from the word "Trilby" being associated with gloves or aprons or blouses either; especially as it is claimed as a trade-mark for gloves, and ladies' blouses and aprons of every kind: and is not confined to such articles of any particular material, quality, or pattern.

(1) [1894] 1 Ch. 645.

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But the reason why I think it cannot be registered is because I do not think that the "word or words" referred to in sub-s. (*e*) of the Act include a proper name at all; and I look upon "Trilby" as a name. Sub-ss. (*a*) and (*b*) deal with names, and sub-s. (*b*), which I will read first, is: "A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark." This is not a written signature at all. Sub-s. (*a*) runs thus: "A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner"; but sub-s. (*a*) says nothing about the individual or firm being the person applying for registration. I take it, therefore, that the individual or firm referred to in sub-s. (*a*) is not confined to the individual or firm applying for registration of the mark in question. It may be any individual or firm.

Now let me take the present case in its simplest form. The plaintiffs are Holt & Co. Supposing Holt & Co. came in and asked to have registered for aprons the name "Holt." That name is not in any way descriptive of the character or quality of an apron. Therefore, if sub-s. (*e*) applies to a name, inasmuch as "Holt" is not a geographical name and does not describe the character or quality of an apron, that name would according to the argument before me be a "word" which might be registered under sub-s. (*e*). But I find a difficulty in so construing the Act. If Holt & Co. desire to have their name registered under the Act, when we look to sub-s. (*a*), what is required is that it must be printed impressed or woven "in some particular and distinctive manner," and I read that as meaning that, if "Holt" is a name that is to be used as a trade-mark, it must be made particular and distinctive. It would not do for them to register "Holt" in ordinary print, which is not particular and not distinctive. I think it is impossible so to read the section as to say that under sub-s. (*a*) Holt & Co. can have their name as a trade-mark if it is printed in a particular and distinctive manner, and under sub-s. (*e*) may have the same name as a trade-mark, when it is not printed in any particular or distinctive manner, but in the plainest and most ordinary style of printing. I think, therefore, that the

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section must be read so as to make the user of names as trade-marks come under sub-ss. (*a*), (*b*): they must be either written, or printed impressed or woven in some particular or distinctive manner. I think, therefore, that Holt & Co. could not have registered their name as a trade-mark except in such manner as is described in sub-s. (*a*), or sub-s. (*b*).

Then does it make any difference that the name proposed is not the name of the person applying, but the name of some one else? I think, looking at the contrast between sub-s. (*a*) and sub-s. (*b*), the latter referring to its being the name of the individual or firm applying, and those words not being found in sub-s. (*a*), that sub-s. (*a*) is not confined to the case of the name of the person or firm applying. Then, if that is so, is there anything to require that the name should be the name of a real individual, living or dead, as opposed to the name of a character in fiction? It seems to be clear that under sub-s. (*a*), not only could Holt & Co. not register their own name, but could not register the name of any other person in any manner which is not particular and distinctive; and the case of *In re Banks & James' Trade-mark* (1) contains this statement by Chitty J. The question there was as to the use of the word "Shakespeare." It was not under the Act of 1888, but under the Act of 1883. He says: "It appears to me that a person cannot take the name of a living person and call it a fancy word not in common use because it was the name of a very great man many years ago. Thus 'Miltonic' or some such name applied to collars would not be good as a mark under s. 64. Nor could any one under that section take the name of any celebrated Englishman living at the present time and register it as used for the first time in reference to some article." Having regard, therefore, to the opinion of the Lords Justices in the "Somatose" case, already referred to, that the Act of 1888 was not intended to confer a larger right to monopolize words than existed under the earlier Act, I take it to be clear that under sub-s. (*a*) the applicant could not register the name of "Shakespeare," or "Sir Walter Scott," or "Du Maurier."

Then does it make any difference that the name used is not

(1) W. N. (1895) 116; 44 W. R. 32.

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the name of an actual person, but the name of a fictitious character? The Act draws no distinction between names which are real, and names which are not. I take it that if "Shakespeare" cannot be registered as a name, it is equally impossible to register "Hamlet." So I do not see why, if Sir Walter Scott's name cannot be used, the name of "Ivanhoe" can; nor why, if Du Maurier's name cannot be used, the name "Trilby" can be used. The word "Trilby" is merely a name; and is only selected because it is a well-known name. Indeed, I do not see why, if the name "Trilby" can be registered, the full name "Trilby O'Farrell" in plain letters could not be registered also—which in my opinion it clearly could not. Chitty J.'s decision as to "Shakespeare" is exactly in point, except that it was under the Act of 1883 instead of the Act of 1888: the latter Act containing different words, but not extending the power of registration. Lindley L.J., in *In re Farbenfabriken Application* (1), says: "The Legislature, in passing the Trade Marks Acts, has also had for one of its objects the exclusion of inconvenient monopolies in words which are already, as it were, common property." If that was an object of the Legislature in passing the later Act, it would be very singular if the name "Trilby," which has become common property now, could be monopolized, as the evidence and arguments before me suggest, by one man for corsets of every kind sold by him; and in like manner by a number of other persons for the gloves, the boots, the tobacco, the soap, and other articles sold by them respectively in their respective trades.

In my opinion the word "Trilby," printed in plain letters, is not a word which can be registered as a trade-mark under s. 64 (*e*). I so decide; and the mark must be expunged.

D. P.

Messrs. Holt & Co. appealed.

C. A.

The appeal was heard on February 28 and March 3, 1896.

The arguments urged in the Court below were repeated on the appeal.

Swinfen Eady, Q.C., and *Micklem*, for Messrs. Holt & Co.

(1) [1894] 1 Ch. 654.

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Vernon Smith, *Q.C.*, and *Kerly*, for Messrs. Saunders, Green & Co.

Sir R. E. Webster, *A.-G.*, and *Ingle Joyce*, for the comptroller. Our view is that North J. has gone too far in holding that "Trilby" was not registrable as a trade-mark. It has been the practice of the office to register the name of an imaginary person as a "word" under sub-s. (*e*) of s. 10 of the Act of 1888, and not as the "name of an individual" under sub-s. (*a*). In consequence, however, of North J.'s decision, the comptroller desires the directions of the Court.

Swinfen Eady, *Q.C.*, in reply.

Cur. adv. vult.

March 16. Lindley L.J. This is an appeal from a judgment of North J. removing the word "Trilby" from the Register of Trade Marks. The word is applied by the plaintiff to ladies' gloves, aprons, and blouses. The question turns on the true construction of s. 10 of the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), which replaced s. 64 of the Patents, Designs, and Trade Marks Act, 1883. [His Lordship read s. 10, and continued:—] This section must be taken in connection with other sections of both Acts, and especially in connection with ss. 68 to 76 of the Act of 1883. The decisions, however, on that portion of s. 64 of the Act of 1883 which relates to fancy words and words not in common use, are inapplicable to the section which has been substituted for it, and which does not contain those words. Clauses (*a*) and (*b*), however, remain unaltered. The word "Trilby" can clearly be registered as a trade-mark. No one disputes this. "Trilby" is either the "name of an individual," and within clause (*a*) of s. 10 of the Act of 1888, or it is a "word" within clause (*e*) of that section. The difficulty is to determine which of these two it is. "Trilby" does not come within any of the other subsections of s. 10. It may have been once an "invented word" within clause (*d*); but it long ago became too well known to fall under that head. On the other hand, "Trilby" is not "a geographical name," nor has it any "reference to the character or quality of goods." The argument that it has is ingenious,

but unsatisfactory. To what character or quality does the word refer? The only answer suggested is that, when used with articles of ladies' clothing, it has reference to such articles as are fit for a lady, or for such a person as "Trilby." This is too fanciful and far-fetched for any practical purpose. *In re Harris's Trade-mark* (1), in which the "Beatrice" shoe was in question, turned on the fancy word clause in the Act of 1883, and not on the Act we have now to consider. The same observation applies to *In re Banks and James' Trade-mark* (2), the "Shakespeare" cigar case. I do not think that the word "Trilby" can fall both within clause (*a*) and within clause (*e*). It must, I think, fall within one or the other, but not within either at the option of the person desiring to register it. If "Trilby," or any other word, is the name of an individual within clause (*a*), it may be registered, but then it must be "printed, impressed, or woven in some particular and distinctive manner." This condition is essential to protect other persons of the same name in the right to use it in their own trade. It was contended that a person might register his own name under (*e*), and that other persons of the same name would be protected by the proviso clause (3). But clause (3) is a proviso to clause (2), and not to clause (1), which states what may be registered. It would, in my opinion, be wrong in law to construe s. 10 of the Act of 1888 as allowing a person to register under (*e*)—i.e., not in a particular and distinctive manner—any word which is the name of an individual within clause (*a*), and which under that clause must be "printed, impressed, or woven in some particular and distinctive manner." Such a construction would render the condition imposed by clause (*a*) nugatory. So far, I agree with the judgment of North J.

There remains, however, the real difficulty in this case, which is to determine whether the word "Trilby" is the "name of an individual" within clause (*a*) of s. 10 of the Act of 1888. Clause (*a*) does not say that the name to be registered need be the name of a living person, nor the name of the applicant for registration. In this respect clause (*a*) differs from clause (*b*). The reference to a firm, however, points rather to real persons

(1) 9 Rep. Pat. Cas. 492. (2) 44 W. R. 32.

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than to imaginary persons. In metaphorical language, an imaginary person may perhaps be called an "individual," but such a use of the word is unusual, and to my mind rather fanciful. It is hardly to be supposed that the Legislature meant "individual" to be taken in a fanciful or metaphorical sense, or meant it to denote an imaginary person who has not, and never had, any real existence. I do not think that such words as Hamlet, Sam Weller, Jupiter, Venus, &c., can be called names of "individuals" within the meaning of clause (*a*) of s. 10. Such names fall within (*e*) rather than (*a*). "Trilby" is clearly a "word" within (*e*), unless it is the name of an "individual" within (*a*), and I am not prepared to hold it to be within (*a*). The language of (*e*) is clear, that of (*a*) ambiguous, as regards the names of persons who have not, and never had, a real existence. That which is clear ought to prevail over that which is doubtful. On this point, therefore, I am unable to agree with North J. The practice of the office has been to allow the registration of names of imaginary persons, although such names are not printed, impressed, or woven in any particular or distinctive manner. The view taken in the office has been that such names are "words" within clause (*e*) of s. 10, and not names of "individuals" within clause (*a*). For the reasons I have given, I think this view and the practice founded upon it are correct.

No doubt the registration of such a name as "Trilby" would give rise to troublesome questions if a person of that name should hereafter make his appearance and wish to carry on business under his own name, or to register his name printed in some distinctive manner under clause (*a*). Such questions would be avoided by deciding that such a name as "Trilby" could only be registered under (*a*).

Again, to hold that such a word as "Trilby" can be registered under (*e*) is open to the objection that such a construction creates monopolies in the use of a great number of common names, without imposing any condition whatever, and invites scrambles to obtain such monopolies. In this respect the Act of 1888 lets in words which were excluded by the Act of 1883 by reason of their being words in common use. On the other hand,

as pointed out in the "Somatose" case (*In re Farbenfabriken Application* (1)), the Act of 1883, by letting in fancy words, was in some respects wider than the Act of 1888, which has left those words out, and replaced them by "invented words." All the Court has to do, however, is to construe the words of s. 10 of the Act of 1888, and of those sections of the Act of 1883 which have to be construed with it. The creation of monopolies in words was no doubt intended by the Legislature, but it is obvious, from s. 10 of the Act of 1888, and from s. 74 of the Act of 1883 (which relates to additions to trade-marks), that whilst, on the one hand, the Legislature has permitted the acquisition of monopolies in many words for trade purposes, on the other hand, it has placed restrictions on that acquisition, with a view, no doubt, to lessen the inconvenience which every monopoly produces. This double object must not be lost sight of. But, after all, the true construction of the Act must be the ultimate guide in every case, and the construction which North J. has adopted is, I think, too far removed from the ordinary meaning of the words "name of an individual" to be sustained. The appeal must, therefore, in my opinion, be allowed with costs.

Kay L.J. The question on this appeal is whether "Trilby" can be registered alone as a trade-mark for ladies' gloves, aprons, and blouses. North J. has held that it cannot. The question turns on the meaning of the Trade Marks Act of 1888. That statute altered the requirements of s. 64 of the Act of 1883. Sect. 10 of the Act of 1888 provides that "a trade-mark must consist of or contain at least one of the following essential particulars." Then there are a number of sub-sections which deal with four subjects—(*a*) and (*b*) a name of an individual or firm, (*c*) a distinctive device, (*d*) an invented word, (*e*) "a word or words having no reference to the character or quality of the goods and not being a geographical name." It is obvious that this last sub-section is not intended to include the matters dealt with by the preceding sub-sections. "Word" in this last sub-s. (*e*) does not mean "name," or "invented word." These are provided for before. On any other construction the preceding

(1) [1894] 1 Ch. 645.

C. A. 1896 *In re* Holt & Co.'s Trade-mark. Kay L.J.

sub-ss. (*a*), (*b*), and (*d*) would be superfluous and unmeaning. The section is in this part of it an exact copy of s. 64 of the Act of 1883, except that, instead of the words "fancy word or words not in common use," sub-ss. (*d*) and (*e*) are substituted. No word, not being a name or a fancy word, could be registered alone under the Act of 1883. "Trilby" cannot be registered as a name under (*a*) or (*b*), because it is not "printed, impressed, or woven in some particular and distinctive manner"; nor is it the signature of the person applying to register. Nor could it be registered as an "invented word" under sub-s. (*d*). It was not invented or first used by the person seeking to register it, which would seem to be necessary in order to obtain registration under sub-s. (*d*). If "Trilby" is not a name of an individual, I cannot see how it can be a "word" under sub-s. (*e*). If it is a word and not a name, it must be an "invented word," and that must be registered, if at all, under the previous sub-s. (*d*). It is none the less an "invented word," because this applicant, not being the inventor, cannot register it under that sub-section. "Word" in sub-s. (*e*) is contrasted with "invented word" under sub-s. (*d*). In sub-s. (*e*), "word" has its ordinary meaning, which, according to the dictionaries, is "a part of speech"—the expression of a mental idea or conception. A meaningless collocation of letters is not a "word" in the ordinary sense. Sub-s. (*e*), contrasted with sub-s. (*d*), seems to me not to apply to anything which would not come within the ordinary signification of a "word."

Now, unquestionably, "Trilby" is a name. Otherwise it has no meaning whatever. Is it the name of an individual? It is the name of a person in fiction. It is a personal name. It is not like the name of a heathen deity, as suggested. It is used as the name of a supposed human being. In that sense it is the "name of an individual." There is no evidence that it was ever the name of a living person. If it ever was I do not see that it would be possible to say that it was not the "name of an individual." "Name of an individual," as used in the Act of 1888, means, I think, a personal name, as distinguished from the name of a plant or an animal. If it is a personal name it cannot be registered, unless it is "printed, impressed, or woven in some particular and distinctive manner." When the name

of a fictitious person is brought in for registration, is there to be an inquiry whether any one has borne the name? And, if not, is it to be treated, not as an "invented word," but as a "word" which may be registered under sub-s. (*e*)? We are told that it is the practice to put names like this on the register. But I believe this is the first time this question has been brought before the Court, and we must decide what is the true effect of the statute in such cases.

On the whole, my opinion is that "Trilby" is a "name of an individual," and that, to entitle it to registration, it must be "printed, impressed, or woven in some particular and distinctive manner." If this were not so, I should think it was an "invented word," which, however, this applicant could not register, because he was not the inventor, nor the person who first used it. But I do not think that an "invented word" which cannot be registered under sub-s. (*d*) can come within sub-s. (*e*) and be registered as a "word" under that sub-section. The result is that I agree with North J., and think that this word should be removed from the register.

A. L. Smith L.J. The question in this case is whether the word "Trilby" printed in ordinary black type can be registered as a trade-mark for gloves, ladies' blouses, and ladies' aprons; and this depends upon the true construction of s. 10 of the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), sub-ss. (*a*), (*b*), and (*e*).

This section is as follows:—

"For section 64 of the principal Act"—that is, the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57)—"the following section shall be substituted:—

"'For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars.'"

This I read as meaning that, if a proposed trade-mark has one of such essential particulars, it may be registered as a trade-mark: aliter, if it has not. These particulars are as follows: [His Lordship read clauses (*a*), (*b*), (*c*), (*d*), and (*e*) of sub-s. 1, and continued:—]

One of these five essential particulars it must have. Now, nto which of these five cases, if any, does "Trilby" fall?

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First, is it a name of an individual or firm within sub-s. (*a*)? If it is, then in my judgment it cannot be registered as it is registered, because, as I read sub-s. (*a*), if it be the name of an individual or firm within the meaning of that sub-section, it must be printed, impressed, or woven in some particular and distinctive manner, which it is not. It clearly is not within (*b*), for it is not "a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark."

I may say at once that "Trilby" does not fall within (*c*), i.e., as "a distinctive device"; nor, in my judgment, within (*d*), for it is not a word coined for the first time by the owner of the trade-mark, it having been used by Mr. Du Maurier in his book in 1893 (1), and was, therefore, not an "invented word" in 1895 when the appellant registered his trade-mark: see the "Somatose" case (*In re Farbenfabriken Application* (2)).

The real question to my mind is, Does "Trilby" fall within (*a*), and if not, within (*e*)? In my judgment, if it falls within (*a*) it does not fall within (*e*), but if not, then it falls within (*e*). North J. has held that the true reading of this s. 10 is that sub-ss. (*a*) and (*b*) are the sub-sections which alone deal with names; and in reality he reads sub-s. (*e*) as if it ran thus: "a word or words other than a name having no reference to character, &c., of the goods": and he holds that "Trilby" is a name, and, therefore, a bad trade-mark per se within (*a*), and cannot come within (*e*), for such does not embrace names of any sort at all. With all respect, I cannot read this section in this way, for it is inserting words which are not to be found in the sub-section, and which, in my opinion, need not be inserted in order to make sense of the whole section.

I read the phrases "individual or firm" in sub-ss. (*a*) and (*b*) as indicating the same thing, that is, the name or written signature of a real human being or a real firm.

(1) The name was not invented by Mr. Du Maurier. It occurred in a French romance ("Trilby, le lutin d'Argail," by Charles Nodier, published in or about 1825), having nothing else in common with Mr. Du Maurier's book, and now forgotten, which was still sufficiently current about fifty years ago for Balzac to use the name as representing a well known type in fiction.—F. P.

(2) [1894] 1 Ch. 645; 11 Rep. Pat. Cas. 84.

It seems to me that the same construction must be placed upon the words "individual or firm" in sub-s. (*a*) as in sub-s. (*b*); indeed, it is not admissible to read them otherwise; and how sub-s. (*b*) can be said to embrace the name of an unreal person, which "Trilby" is, or of an unreal firm, I do not see.

The words of sub-s. (*b*) are "a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark." This clearly must mean a real individual, for how can a fictitious person or a fictitious firm apply for the registration of a trade-mark?

As it is quite impossible, in my judgment, to make "Trilby" fall into sub-s. (*b*) as being an individual as therein designated, so it appears to me equally impossible to make "Trilby" fit into sub-s. (*a*). In my judgment these sub-ss. (*a*) and (*b*) do not embrace fictitious names such as emanate from the pen of novel writers or from the creative brain of other composers; and this being what the name of "Trilby" is, it does not, in my opinion, fall within sub-s. (*a*).

That the name "Trilby" is a word I do not doubt. It is nothing more nor less than a fictitious fancy name—i.e., a word. Is it then a word having reference to the character or quality of the goods, or is it a geographical name? I agree with North J. in this, and I say it is neither. Why, then, is it not within sub-s. (*e*) of s. 10? In my judgment sub-s. (*e*) embraces a name which does not fall within sub-s. (*a*), and as "Trilby," for the reasons which I have given, does not fall within (*a*), and as it has the essential particulars named in sub-s. (*e*) of being a word having no reference to the character or quality of the goods and not being a geographical name (I would point out that geographical names are dealt with in sub-s. (*a*)), I think that "Trilby" is a good trade-mark within sub-s. (*e*), and for these reasons I think that this appeal should be allowed.

Solicitors: *Sharpe, Parker, Pritchards & Barham; E. Le Voi; Solicitor to the Board of Trade.*

G. I. F. C.

C. A.
1896
March 3, 4, 26.

LIQUIDATION ESTATES PURCHASE COMPANY *v.* WILLOUGHBY.

[1893 L. 820.]

Mortgage—Purchase of Equity of Redemption—Payment of Mortgage Debt by Purchaser—Presumption of Intention to keep alive Security.

An assignment by divers incumbrancers to a purchaser who paid them off:—

Held, by a majority of the Court, in the circumstances, not to shew any intention of keeping alive the first charge.

Discussion of the limits of the equitable presumption in favour of such intention.

Toulmin v. *Steere* (3 Mer. 210) questioned.

Appeal by the plaintiffs against the judgment of North J. at the trial of the action.

The plaintiffs were the purchasers of the interest of A. J. C. Kennedy (one of the defendants) under an agreement dated June 20, 1888. This interest was sold to them by the second mortgagee thereof in exercise of his power of sale, and the plaintiffs at the same time acquired the interest of one John Norton, the first mortgagee, and the main question on the appeal was, whether on the assignment of those interests to the plaintiffs, by a deed dated March 17, 1893, the charge in favour of Norton was extinguished or was kept alive for the benefit of the plaintiffs. North J. held that this charge was extinguished.

On June 20, 1888, one E. J. Walker, having contracted to purchase a partnership business for 502,000*l.*, agreed with Sir J. C. Willoughby (the first defendant), Lord Henry Paulet, and the defendant Kennedy to borrow from them respectively 10,000*l.*, 9000*l.*, and 6000*l.*, for which he gave them a charge upon all his interest, present and future, in his contract. For these loans the lenders respectively were to receive a bonus equal in amount to their respective advances. In January, 1889, Walker sold the business to a joint stock company called Walkers, Parker & Co. for 850,000*l.* Kennedy's claim against Walker amounted to 12,000*l.* On September 21, 1888, Kennedy mortgaged his interest under his agreement with Walker

to John Norton for 6200*l.* This mortgage did not contain a power of sale. Notice of the mortgage was given to Walker on October 24, 1888, but no notice was given to the other lenders. In July, 1889, 5122*l.* was paid by Walker, or by Walkers, Parker & Co. by his directions, to Kennedy, and in June, 1890, property worth 5000*l.* was in like manner transferred to Kennedy, thus reducing his claim against Walker to 1878*l.* There was a dispute as to whether those payments were made with the knowledge of Norton. In the meantime Kennedy had mortgaged his equity of redemption to Lord Windsor; and in December, 1890, this mortgage was transferred to one Forrest as his trustee. A power of sale was given to Forrest. This transfer was confirmed by Kennedy in 1891.

On March 17, 1893, the deed was executed which raised the principal question in the case. By this deed, after recitals of the facts above stated and a recital that Lord Windsor had agreed to sell to the Capital and Finance Company for 6000*l.* (inter alia) "All the interests of the said Lord Windsor or of the said John Norton of and in the premises comprised in and charged by the said instrument of June 20, 1888," and that Norton concurred in the deed on the terms that he should receive 1000*l.* out of the 6000*l.* "as the consideration for the sale and assignment of his rights, benefits, and interests," and a recital that the Capital and Finance Company had paid to Lord Windsor 4000*l.*, and that the Liquidation Company (the plaintiffs in this action) would pay the balance of the 6000*l.*, it was witnessed that Norton, "at the request of Lord Windsor and in respect of his rights, powers, benefits, and interests under the agreement of September 21, 1888," assigned, and Lord Windsor and Forrest, as his trustee, assigned, and the Capital and Finance Company released and confirmed to the Liquidation Company "all the estate and interest of Lord Windsor, Norton, and Forrest of and in the interest formerly of Kennedy in or under the agreement of June 20, 1888, and the moneys and bonuses thereby secured" absolutely. Then followed a provision that, if Norton or Lord Windsor respectively or either of them had a power of sale over the premises or any part thereof, the deed should be deemed to operate as a

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conveyance upon a sale in exercise of that power. Lord Windsor had, as already stated, a power of sale, and the deed accordingly took effect as an exercise of his power. But Norton had no such power, and the question was whether this deed operated as a transfer of his mortgage to the present plaintiffs, or only as a release of his interest in the fund charged.

In June, 1889, Willoughby brought an action—*Willoughby* v. *Paulet* [1889 W. 1919]—against Lord Henry Paulet, Kennedy, Walker, and others (Norton not being a party) to realize his security. In January, 1891, judgment was given in that action for an account of what was due to the three mortgagees, Lord Henry Paulet, Willoughby, and Kennedy, and of their respective receipts. A considerable sum, part of the fund mortgaged by Walker, was paid into court, and was still there when the present action was tried. An order of the Court directed that this sum was to be applied in paying Lord Henry Paulet and Willoughby, so as to put them on an equality with Kennedy, before anything more should be paid in respect of Kennedy's share.

The present action was brought by the Liquidation Company against Willoughby, Kennedy, the trustee in bankruptcy of Lord Henry Paulet, Walker, and Walkers, Parker & Co. Two persons named Brandon and Bayley, and the Capital and Finance Company, were also made defendants as claiming some beneficial interest in the share and interest of Lord Henry Paulet.

The plaintiffs claimed an account of what was due to them under the charge to Norton of September 21, 1888, and as transferees of Lord Windsor's interest, and to have the fund in court to the credit of *Willoughby* v. *Paulet* applied towards payment of what should be found due to the plaintiffs, and other relief.

North J. held that the charge in favour of Norton had been extinguished.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *Dauney*, for the appellants. In ascertaining the amount payable to the appellants, Kennedy's

share must be treated as being the full amount originally secured to him, without deducting from it the two sums of 5122*l.* and 5000*l.* paid to him by Walker after notice of Norton's charge, i.e. 12,000*l.* The appellants are Norton's successors in title, and stand in his shoes, and Norton was entitled to repudiate those payments, which were made without his knowledge.

As the transferees of Norton the appellants are entitled to the benefit of the charge created by the mortgage of September 21, 1888, as a subsisting charge. The transaction carried out by the deed of March 17, 1893, was a purchase of two mortgage debts of such an amount as to render the equity of redemption valueless, and it ought to be presumed that Norton's security was intended to be kept alive for the benefit of the purchasers, for it was undoubtedly to their interest that it should be so. The question is strictly one of intention, and the frame of the deed itself and the surrounding circumstances shew that this must have been the intention. The transferees paid 1000*l.* for Norton's rights and interests. They would not have paid him 1000*l.* for nothing. By the deed Norton did not release or purport to release his security: he "assigned all his rights, powers, benefits, and interests," which is inconsistent with an intention to release or merge his charge. The Capital and Finance Company, on the other hand, "released." Norton's interest was his right to hold the subject-matter of his security until he was paid. He had no power of sale. The guiding intention must be that of the transferee, for the transferor gets his money and cares nothing more about the matter. There is in this case a clear equity in the appellants to have this charge treated as subsisting, and no contrary intention can be inferred from either the deed or the circumstances under which it was executed. The principle to be applied is, that where a man pays off a charge for which he is not personally liable and takes an assignment of it, and it is for his benefit to keep the charge alive, his intention to do so must be presumed: *Thorne* v. *Cann* (1); *Stevens* v. *Mid-Hants Ry. Co.* (2); *Adams* v. *Angell.* (3)

(1) [1895] A. C. 11, 18. (2) L. R. 8 Ch. 1064. (3) 5 Ch. D. 634, 645.

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Vernon Smith, *Q.C.*, and *W. C. Druce*, for the defendant Willoughby. Under the circumstances it is not possible to come to the conclusion that there was any intention to keep alive Norton's charge. If there had been such an intention, nothing would have been easier than to express it in direct terms.

On the question whether the payments to Kennedy were made with Norton's consent, he was not called, though he had been subpœnaed and was in court at the trial. The plaintiffs cannot stand in any better position than Norton.

Herbert Brown, for Brandon.

Edward Ford, for Bayley.

Abinger, for the Capital and Finance Company.

Swinfen Eady, *Q.C.*, in reply. The onus of calling Norton was not on the plaintiffs. When a mortgage deed is produced primâ facie the mortgage money is due. The onus probandi is on those who allege that the money has been paid in whole or in part. No payment could be valid if it was not made to Norton, or by his direction or with his consent.

Cur. adv. vult.

March 26. The following judgment of Lindley and A. L. Smith L.JJ. was read by

LINDLEY L.J. This is an appeal from an order of North J., and the question raised by the appeal is, what are the plaintiffs' rights under an assignment of an equitable charge created in favour of Norton.

The case turns on the effect of Norton's charge in the first instance, and also on the effect of the deed of March 17, 1893, by which that charge was assigned to the plaintiffs. In order to understand this charge and deed the circumstances under which they were executed must be understood. [His Lordship stated the facts, and continued;—]

Whether the payments of 5122*l.* and 5000*l.* made by Walker to Kennedy were made without Norton's knowledge and consent it is impossible to say. The plaintiffs allege that the payments were made without Norton's knowledge. There is no evidence

on this point one way or the other, and it is impossible for the Court to determine what Norton's interest in his security really was when he assigned it to the plaintiffs. This, however, is a very important matter in considering the effect of that assignment.

Before referring in detail to the deed of March 17, 1893, we will state shortly what the plaintiffs claim.

Walker, or Walkers, Parker & Co. for him, paid off to the lenders considerable parts, but not the whole, of the sums secured to them respectively by the agreement of June 20, 1888. There being difficulties in obtaining payment of the balances, an action was brought by Sir John Willoughby against Lord Henry Paulet and others in order to obtain payment of the sums still due to the lenders on their security. Kennedy was a party to that action; but Norton, Lord Windsor, and the plaintiffs were not parties. There is in court to the credit of that action a considerable sum of Consols, and this sum, together with some shares in Walkers, Parker & Co. belonging to Walker, represent what is left of the property charged by the agreement of June 20, 1888, as security to the lenders. For shortness we will call this sum of Consols and these shares the fund in dispute. It is divisible amongst the three original lenders, or their assigns, in proportion to the amounts still due to them respectively under the agreement of June 20, 1888. Kennedy's share of this fund belongs to the plaintiffs. No one disputes that. But the plaintiffs contend that, in ascertaining the amount payable to them, Kennedy's share must be treated as 12,000*l.*, namely, the full amount originally secured to him, without deducting therefrom the two sums of 5122*l.* and 5000*l.* paid to Kennedy by Walker after notice of Norton's charge. The plaintiffs contend that Norton was entitled to repudiate those payments, and that they are in the same position as Norton. This contention is naturally resisted by the two other lenders and by those who claim under them.

Why the other lenders are to suffer by reason of Walker's wrongful payments to Kennedy after notice of Norton's charge is by no means obvious. That Norton had a right of action against Walker in respect of these payments is not disputed;

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but we are not by any means convinced that the effect of the agreement of June, 1888, was to entitle Norton to throw upon the other lenders any part of the loss sustained by him by reason of Walker's wrongful payments to Kennedy. Norton's loss could not, of course, exceed the amount due to him on his security, and this we understood the plaintiffs' counsel to admit. But even to this extent we fail to understand how Norton could, as against the other lenders, claim more of the fund than Kennedy's share of it, after giving credit for the payments made to him. The other lenders had no notice of Norton's security, nor could they have prevented Walker from paying Kennedy. Under these circumstances the plaintiffs' contention that Norton had any such right as they allege does not commend itself to our sense of justice nor to our notions of equity. However, this point is not alluded to in the judgment of North J., and we will assume it in the plaintiffs' favour.

The plaintiffs allege that the payments to Kennedy were made without Norton's knowledge. The defendants deny this statement, and contend that it is incumbent on the plaintiffs to prove it, and that, not having done so, the plaintiffs have failed to make out their case, even if they could have established it by proving want of notice. It is true that the plaintiffs did not prove their allegation, but they did enough to throw upon the defendants the burden of proving that these payments were made with Norton's knowledge and consent. The plaintiffs put in Norton's security. This was primâ facie evidence of a charge for 6200*l.* on the 12,000*l.* due to Kennedy on his security of June, 1888, at the date of Norton's charge. If, then, the defendants say that this sum has been so reduced as to avail them they must prove their contention—in other words, they must prove that the 12,000*l.* has been reduced with Norton's knowledge and consent. This is not shewn, and it would not, therefore, be right on this short point to decide against the plaintiffs.

We pass now to the consideration of the effect of the deed of March 17, 1893. [His Lordship stated the provisions of the deed.] There is no doubt that this deed was intended to transfer and did transfer to the plaintiffs all Norton's interest

in the security of June, 1888. But the question is, whether the interest so transferred was transferred in order to be extinguished, so that the plaintiffs might obtain Kennedy's interest in the security of June, 1888, free from incumbrances, or whether Norton's interest was so transferred as to enable the plaintiffs to treat it as still subsisting, so as to confer upon them rights against third parties which Lord Windsor and Forrest could not confer. The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed. The fact that Norton assigned his interest, and that the Capital and Finance Company released theirs, is relied upon by the plaintiffs as shewing that Norton's assignment was not intended to operate as a release. But the interests of Norton and of the Capital and Finance Company were of such different characters that the use of different operative words to dispose of them is easily accounted for. Moreover, Norton assigned as mortgagee, and it seems to have been thought that he had or might have a power of sale. Under those circumstances we cannot think the argument based on the above-mentioned difference of language in the operative words at all conclusive. We must look further, and see what the real object of the parties was.

The law upon this subject was laid down by Jessel M.R. in *Adams* v. *Angell* (1) as follows: "In a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in

(1) 5 Ch. D. 634, 645, 646.

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the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So in the case of a purchaser, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So also, it is admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot and protects him. The intention, therefore, if expressed, governs the case, but if no intention is expressed, then *Toulmin* v. *Steere* (1) says that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in." According to this statement, a purchaser who pays off a charge must shew an intention to keep it alive if he wishes to prevent its merger. Such an intention was shewn in that case, and also in *Thorne* v. *Cann*. (2) Having regard to this decision, it is perhaps now safe to go a little further, and to say that, where a purchaser of a property pays off a charge on it, without shewing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. We do not, however, think that the opportunity of making a very doubtful claim against third parties is such a benefit as is meant in such an enunciation of the doctrine under consideration. We are not aware of any case which shews that it is.

But further, we take it to be clear that, if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser after-

(1) 3 Mer. 210. (2) [1895] A. C. 11.

wards finds it would have been better for him to have kept the charge alive. That, in our opinion, is the case here. The speculative character of Norton's claim against the other lenders, the absence of all allusion to the existence of any such claim, the absence of any assignment of his debt, the ignorance we are in even now of the amount due to him (for it is admitted that 6200*l.* is not), the recital of the agreement with Lord Windsor, and, lastly, the unusual clauses which follow the habendum, lead us to the conclusion that it was intended to extinguish Norton's claim, and not to keep it alive, except in the event of the plaintiffs failing to obtain a good title under a valid power of sale. In that event no doubt, as Kennedy would have a right to redeem, both Norton's and Lord Windsor's charges would have to be treated as subsisting. What the plaintiffs, however, wanted was to purchase Kennedy's interest free from incumbrances under a power of sale. The recitals shew that the real transaction was a sale by Lord Windsor under his power; but 1000*l.* of the purchase-money was to be paid to Norton to get rid of his claim. The plaintiffs have got exactly what they expected, and what they intended to buy, and they are not entitled now to treat Norton's charge as a subsisting charge. If, indeed, there were some unknown mesne incumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin* v. *Steere* (1), it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it. It is on this ground that the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him. See, for example, *Phillips* v. *Gutteridge* (2); *Anderson* v. *Pignet*. (3) This, however, is not a case in which the charge

(1) 3 Mer. 210. (2) 4 De G. & J. 531.
(3) L. R. 8 Ch. 180.

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is wanted for any such purpose; and to treat Norton's charge as still subsisting under the circumstances of this case would be to stretch the equitable doctrines to which we have alluded much too far.

We are of opinion that the decision appealed from is correct, and that the appeal ought to be dismissed with costs.

KAY L.J. read the following judgment:—The plaintiffs claim to stand in the shoes of Norton, and to share rateably in the fund in Court in *Willoughby* v. *Paulet*. Two answers are given to this claim. First, it is denied that the present plaintiffs have any transfer of Norton's mortgage; and, secondly, it is urged that the payments to Kennedy were made with Norton's sanction, and are consequently good against the plaintiffs as his assigns. I was struck at first with this second defence; but there is no evidence that Norton sanctioned or knew of the payments. Norton was in Court at the trial of this action, but was not called as a witness by either side. The plaintiffs alleged in their pleadings that Norton had not sanctioned these payments, and at first it seemed to me that they ought to prove this allegation; but on consideration I am of opinion that the burthen of this proof was entirely on the defendants. The case must, therefore, be dealt with as though Norton was ignorant of the payments made by Walker to Kennedy, and must depend upon the decision of the first of the two points which I have mentioned, namely, Is Norton's mortgage to be treated as subsisting for the benefit of the plaintiffs as his assigns? Or was that mortgage merged and extinguished by the deed of March 17, 1893?

No express intention to keep the mortgage alive appears on the face of the instrument. The debt due to Norton is not in terms assigned, as in the case of an ordinary transfer; but Norton does not (like the Capital and Finance Company) release his debt. On the contrary, he assigns in the largest terms all his "rights, powers, benefits, and interests." This does seem inconsistent with an intention to release and merge his charge. If that were all that was intended, a simple release would have been sufficient. Norton would hardly have assigned

his "rights, powers, and benefits" unless the parties intended the plaintiffs to have the use and advantage of them.

In many cases in which no actual intention to keep a mortgage debt on foot could be discovered, the Court of Chancery has refused to treat it as merged when its existence was necessary for the protection of a bonâ fide purchaser.

In *Toulmin* v. *Steere* (1) the purchaser of an estate paid off two mortgages with part of the purchase-money, and the owner of those mortgages joined in the conveyance. There was an incumbrance subsequent to one of those mortgages, but prior to the other of which the purchaser had constructive notice. There was no evidence of an intention by the purchaser to keep the first mortgage alive, and Sir William Grant M.R. held that it was merged for the benefit of the unpaid incumbrancer.

This case has been much criticised, and I do not think it would be so decided if the question arose now for the first time. [His Lordship stated the facts, and continued:—]

Take, for example, *Phillips* v. *Gutteridge*. (2) Two mortgagees and the executors of the mortgagor joined in a mortgage for 1200*l*., part of which the deed stated was to be applied in paying off 400*l*. due on one mortgage and 300*l*. due on the other. The mortgage debts were not assigned. The mortgagees assigned and the executor assigned and confirmed to the new mortgagee the property, which was leasehold, and all their respective estates and interests therein. There was no intention to keep the mortgage alive expressed, and the form of the deed was rather against such an intention. But, though Knight Bruce L.J. in his judgment said that the deed was so constructed as to render it possible that the payment to the original mortgagees extinguished the mortgage debts as debts, the intention to preserve the priority of those debts over charges created by the will of the mortgagor was indubitable.

This conclusion was obviously nothing but the presumption of an intention from the fact that the existence of these mortgages was important to protect the new mortgagee against the charges created by the will.

(1) 3 Mer. 210. (2) 4 De G. & J. 531.

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In *Adams* v. *Angell* (1) Jessel M.R. said (2) that where the owner of an estate in fee or tail pays off a charge the presumption is that he does not mean to keep it alive, but by expressly declaring his intention he may either keep it alive or destroy it. "If there is no reason for keeping it alive then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. . . . The intention, therefore, if expressed, governs the case, but if no intention is expressed, then *Toulmin* v. *Steere* (3) says that the incumbrance which is paid off is merged." Sir George Jessel treats the existence of another incumbrance as one reason, but says that, if there is any reason such as that, the Court will treat the mortgage as subsisting.

In *Thorne* v. *Cann* (4), *Toulmin* v. *Steere* (3) was mentioned as having been criticised, but it was not overruled. Lord Macnaghten (5) stated the law thus: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

In the present case the purchasers paid 1000*l.* for Norton's concurrence. The words of the deed are large enough to pass any claim of Norton against the fund. Is there, then, to use the language of Sir George Jessel, any reason for keeping Norton's charge alive? Considering, to use Lord Macnaghten's words, whether it is for the benefit of the purchaser to do so, must the intention to keep it alive be presumed?

If a charge were to be discovered next after Norton's and before that of Lord Windsor, would Norton's debt be treated as merged? In my opinion it would not. It cannot be treated as

(1) 5 Ch. D. 634.
(2) Ibid. 645.
(3) 3 Mer. 210.
(4) [1895] A. C. 11.
(5) [1895] A. C. 18.

alive for one purpose of benefit and yet as extinguished as regards another. In the circumstances of this case there is a material advantage to the plaintiffs, who are purchasers for value, in treating the debt as subsisting, and I cannot discover any reason to prevent them from invoking this doctrine of equity in their favour.

If Norton did not sanction the payments to Kennedy, Norton at the date of the assignment in 1893 had, to the extent of the debt owing to him by Kennedy, a claim upon the fund which is now in court in the other action to share rateably, in the proportion of Kennedy's original claim, with Willoughby and Lord Henry Paulet. This right or benefit he assigned. If Kennedy had not such a right it would obviously be for the benefit of the purchaser to keep Norton's right alive.

Willoughby and Lord Henry Paulet are, I assume, innocent of any participation in Walker's wrong-doing by the payments which he made to Kennedy. But Norton must be treated as equally innocent, and they, although they knew of his charge, would not make Norton a party to their action against Walker in which the fund remaining was ultimately secured in court. I cannot see that Willoughby and Lord Henry Paulet, or those who represent him, have any equity to rebut this claim in the name of Norton.

On the whole I think there was a strong reason in 1893 for keeping alive Norton's debt, and that there was a benefit to the plaintiffs in so doing which would justify a presumption of their intention to keep the debt in existence. Norton's claim against the fund in court in *Willoughby* v. *Paulet* would pass by his assignment in 1893 to the plaintiffs, and I cannot see that this claim should be treated as merged.

I therefore, though with reluctance, differ from the judgment of the other members of the Court.

Solicitors: *Howard Rumney; Dawson, Bennett & Dawson; G. S. & H. Brandon; W. Stopher; J. Crawshaw & Co.*

W. L. C.

C. A.
1895
KEKEWICH J.
Dec. 3.
C. A.
1896
Jan. 20, 21.

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Infants—Wards of Court—Custody—Religious Education—Parental Authority—Misconduct of Father.

Although by law it is the right of the father to have the care and custody of his infant children and to have them brought up in his own religion, the welfare of the infants is the paramount consideration, and the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and to disregard his wishes as to their religious education. The conduct of a living father may be such as to compel the Court to exercise this jurisdiction.

A Roman Catholic father allowed his two infant children by a deceased Protestant wife to be brought up in the Protestant faith until one of them was fifteen and the other eleven years of age, and his conduct to them, in the view of the Court, shewed that he had abdicated his parental rights. The children were wards of Court, and the father, being desirous of resuming his parental authority, applied to the Court for an order that the children might thenceforth be brought up in the Roman Catholic faith :—

Held, by the Court of Appeal, affirming the judgment of Kekewich J., that it would be injurious to the welfare of the children that their religious training should be altered, and that, having regard to the conduct of the father and the circumstances of the case, his application must be refused.

THE infants in this case were two girls, aged respectively fifteen and eleven years, who were the only surviving children of John Newton, and this was a summons taken out by him for an order that they should be transferred from Collingwood College, Lee, Kent, a Protestant school where they were being educated, to St. Joseph's Convent and Higher Grade School at Bury in Lancashire, or to some other suitable Roman Catholic school.

Their father, who was a fish dealer in a small way of business at Bolton in Lancashire, was a Roman Catholic, and their mother, who had died in 1888, was a Protestant, and at first a Wesleyan, but afterwards a member of the Church of England. At the time of the marriage of their parents it had been agreed that the children of the marriage should be brought up as Roman Catholics, but it appeared that the father had not insisted upon this agreement being carried out ; and so long as the mother was alive he had allowed the children, who were

six in number, to be brought up in her faith. According to the evidence the same course was followed for several years after her death: the children had been sent to Protestant schools, and had, with their father's knowledge, attended the Church of England Sunday-school, and not one of them was ever brought up as a Roman Catholic. During the life of his wife the father was a teetotaler, but after her death in 1888 he took to drink. From 1888 to 1894 he was an intemperate man, and he was several times convicted of being drunk and disorderly. Four of the children had died, and he neglected his two surviving children, and dissipated money which had been allowed him for their maintenance, so that they had been found by their half-brother in a state of destitution, and had been removed by him from their father's house. An aunt of the mother had died in October, 1890, having by her will left each of these two infants an annuity of 50*l.* per annum, payable by trustees who were Protestants; and in this state of things an application was made to the Court on their behalf; and, after notice to the father, and upon evidence as to his conduct, an order was made on December 3, 1894, the father not appearing, that the infants should be given into the custody and care of Dr. Scowcroft of Lancaster for four years, and that the father should be restrained until further order from removing the infants from such custody, or from disturbing or interfering with the infants in any manner whatever. The infants were then placed under the order of the Court at the above-mentioned Protestant school, where they still remained.

The father never appealed from the order of December 3, 1894; but in 1895 he took out this summons, and produced evidence to the effect that since his last conviction for being drunk and disorderly in August, 1894, he had become a reformed man, and that although he might formerly have been irreligious, and even a scoffer, he was now a religious man, and attached to the Roman Catholic faith, in which he was educated, and that he was desirous that his children should be brought up in his own religious faith.

Some further details of the facts of the case will be found in the judgments of Kekewich J. and Kay L.J.

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The summons was heard before Kekewich J. in chambers, and, after argument by counsel, his Lordship took time to consider his judgment, and subsequently delivered a written decision in the following terms :—

KEKEWICH J. On this occasion the only question is whether the infants shall be brought up as Roman Catholics or as members of the Church of England. Other matters have been and will hereafter be discussed, but they do not arise now. The father does not ask for the custody of the children, and, provided reasonable opportunities for seeing them (about which there is no difficulty) are given, he is content that the present arrangements shall be continued. But he asks that they may be educated as Roman Catholics, and bases his request on parental authority. I must take it to be proved that the father is and always has been a Roman Catholic. That until recently he was lax in religious observances is admitted, but as far as he is personally concerned that is all that can be said. He swears that on his marriage he stipulated that the children should be brought up as Roman Catholics, and that uncontradicted statement must be admitted for what it is worth. The stipulation never had practical effect. Not only were the children baptized as members of the Church of England, but so long as their mother lived they were brought up in that communion. I conclude that the mother was a religious woman, distinctly a member of the Church of England, and anxious that her children should also be members thereof; and whether by reason of love for her, or because he was careless in the matter, the father seems to have entirely given way to her in this particular. But the girls were taken by the mother regularly to church and attended the Sunday-school. The elder girl has never yet attended a Roman Catholic church or school, and the younger girl has only done so since the mother's death. The elder girl told me that her father had expressed unwillingness to go against the mother's wishes in this matter. The elder girl is now fifteen, the younger only eleven. It is difficult to compare two girls of such different ages—four years at that time of life representing, of course,

large opportunities for development of character. But it seemed to me that the elder girl was far the stronger of the two, and is likely hereafter to influence, as apparently she now influences, her younger sister. They are evidently devoted to one another as sisters should be. I did not think it right to question the elder girl respecting the differences in doctrine or otherwise between the churches, but she expressed an anxious desire to remain in the Church of England and a strong objection to being henceforth educated as a Roman Catholic. This arises partly from habit, partly from the teaching of those with whom she had been associated, but still more from affectionate memory for her mother's wishes, with which she appears to be well acquainted. She gave me her views on this point simply and tenderly without any pressure on my part, in such manner as convinces me that the feeling was genuine and deep. I did not think it right to ask the younger girl, whom I saw separately, any questions respecting the churches. She seemed to me too young and her character too unformed to allow this to be done with advantage. I was confirmed in this by finding that she did not at all remember her mother, and therefore could not be guided by personal recollection of her wishes. It would be too much to say that as regards the elder girl change of religious education would certainly unsettle her faith, but it undoubtedly would be a shock to her, and it is difficult to forecast the results. It will be concluded from what is above stated that there is no such difficulty as regards the younger girl, but she would deeply feel separation from her sister, and I should expect it to do mischief. I have considered long and anxiously what ought to be done. Not only have I read the numerous affidavits again and again, but I have given my best attention to a full argument from counsel not the less able because it was temperate, and I have considered, with some others, the authorities cited, which include, I think, all the modern cases on the subject. I entertain no doubt that it is for the benefit of the girls that they should continue to be educated as they hitherto have been as members of the Church of England, and the only question is whether the conduct of the father justifies the Court in acting in this matter

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for his children's benefit against his wishes. My conclusion is that I am free to act on my own judgment. There is no difficulty in finding many passages in many of the cases which read by themselves contradict this, and there is so far as I am aware nowhere laid down any rule by which one can determine what amounts to an abnegation by a living father of his parental authority. These infants' father must, in my opinion, be taken to have deliberately allowed his children to be brought up as members of the Church of England until it is too late for him to insist on the desired change. I therefore intend to direct that the girls shall be educated in future as hitherto as members of the Church of England.

The case came before me in chambers, and, after having been discussed more briefly several times, I appointed an afternoon for having a full argument on the part of the father in my private room. Therefore no judgment will be delivered in open court; and if the usual course were followed, my decision would be communicated to the chief clerk verbally or in a short note. Having regard, however, to the importance of the case, and to the possibility of its being taken to the Court of Appeal, I have considered it fair to state my views in writing to be communicated to the parties, and to be read, if need be, to the Court of Appeal. I desire to add that, as at present advised, and not, of course, having given the same consideration to this question as I should have done if I had arrived at a different conclusion on the other question, the importance of bringing up the two girls together is so great that, if perchance the parental authority is held to be in full force as regards the younger only, I should wish both to be educated as Roman Catholics. What has induced me to say this will be apparent from what is above written.

C. A. The father appealed. The appeal came on for hearing on January 20, 1896.

Costelloe, for the appellant. A father has by law the right to the custody and control of his children, and to bring them up in his own religion; and the Court has no jurisdiction to

deprive him of those rights unless his conduct is such that it is absolutely necessary for the safety and welfare of the children to do so. Mere intemperance on the part of the father is not enough: *In re Goldsworthy* (1); and here he is a reformed man, anxious to do his duty by his children, and their only natural protector, but deprived of their custody and at the mercy of the trustees as to access to them, although he ought now to be associated, at all events, with the trustees.

[KAY L.J. The infants here are wards of Court, and the Court is acting as their guardians.]

This is the case of a living father, and the Court cannot interfere with a living father unless he abuses his parental authority.

[KAY L.J. referred to *Reg.* v. *Gyngall* (2) and *De Manneville* v. *De Manneville.* (3)]

The Court will not countenance the education of children in a religion different to that of the father, and against his wish: *D'Alton* v. *D'Alton* (4); *In re Meades.* (5) The learned judge in the Court below, in considering what would be most for the benefit of the infants, was much impressed by the consideration that though the younger sister had not imbibed any religious opinions the elder had, and that the two ought not to be separated; but surely it is far worse for children who are motherless and have no natural protector but their father, to be separated from him and brought up in a religion different to his. His authority unless he abuses it is paramount, and as to the younger child must prevail; and as to the elder, she should also be associated in her religious education with her sister according to the father's wishes, even although she may have already received some religious impressions: *Davis* v. *Davis* (6); *In re Scanlan* (7); *Barnardo* v. *McHugh.* (8)

[LINDLEY L.J. referred to *In re Agar-Ellis.* (9)]

Hopkinson, Q.C., and *Ryland*, for the respondents. The paramount consideration must be what is most for the benefit

(1) 2 Q. B. D. 75.
(2) [1893] 2 Q. B. 232.
(3) 10 Ves. 52.
(4) 4 P. D. 87.
(5) I. R. 5 Eq. 98.
(6) 10 W. R. 245.
(7) 40 Ch. D. 200.
(8) [1891] A. C. 388.
(9) 10 Ch. D. 49; 24 Ch. D. 317.

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of the infants: *Reg.* v. *Gyngall.* (1) Primâ facie, no doubt, where the father is living, his wishes with regard to the religious education of his children will prevail; but he may by conduct forfeit or abdicate his rights; and if compliance with his wishes would inflict substantial injury upon the infants, they will be disregarded: *Barnardo* v. *McHugh* (2); *In re Nevin* (3); *Hill* v. *Hill* (4); *Lyons* v. *Blenkin* (5); *In re Agar-Ellis* (6); *Stourton* v. *Stourton.* (7) The authorities establish that under any of the following circumstances the wishes of the father will be disregarded: (1.) when he is absolutely unfit to have the custody of the children; (2.) when he has allowed a course of religious training to go on so long that it would be injurious to the child to change its religion; (3.) where the father has abandoned, abdicated, or forfeited his parental rights; (4.) where the child is of sufficient age to have religious understanding and intentions of its own. The evidence in this case brings the father within all these propositions as to the elder child, and within the first three as to the younger; and there is also authority to shew that in such a case as this, where the two sisters have been brought up together, and are to continue so to be brought up, their religions should be the same; and if the Court is of opinion that it cannot interfere with the religion of the elder sister, this should influence it in its decision with regard to the religion of the younger: *In re McGrath.* (8)

Costelloe, in reply. Down to his wife's death this man was for eighteen years a teetotaler. It is true that he then lapsed and became inebriate for a time. But he has since become a temperate and religious man, he has sincerely returned to the Roman Catholic faith, and he is not now unfit to have the custody of his children or to exercise his discrimination as to the religious education of either of them. They have no other natural protector, and the Court is bound to have regard to his wishes as regards the younger child, at any rate. As to *In re McGrath* (9), there the father and mother were both

(1) [1893] 2 Q. B. 232.
(2) [1891] A. C. 388.
(3) [1891] 2 Ch. 299.
(4) 8 Jur. (N.S.) 609; 10 W. R. 400.
(5) Jac. 245.
(6) 10 Ch. D. 49; 24 Ch. D. 317.
(7) 8 D. M. & G. 760.
(8) [1892] 2 Ch. 496, 515.
(9) [1893] 1 Ch. 143.

dead, and the Court was doing the best it could under the circumstances.

LINDLEY L.J. I do not think that anything will be gained by our taking time to look into the authorities, as we have had them so often before us; and as regards the facts, we are in a position to deal with them, having availed ourselves of the interval since yesterday to look into them. They are not really in dispute except as to a very small matter.

The case is a curious one, and not altogether free from difficulty. We must, first of all, consider how it arose. The father of these infants is a fish dealer, and one does not expect from people in that class of life any great refinement, and one must make allowances for his being a rough man. He is a poor man and a rough man, and the children of such a man must accept the situation in which they are born. [His Lordship then stated the facts of the case, and continued:—]

The controversy before us is as to what religion these two little girls are to be brought up in.

The law applicable to the case will be found fully stated in the cases of *In re Agar-Ellis* (1) and *In re McGrath.* (2) The question has been carefully considered, and it has been held that it is the duty of the Court to bring up the children in the religion of the father, unless there is sufficient reason for disregarding his wishes.

That this Court has jurisdiction in a proper case to disregard those wishes is plain; but there must be very unusual circumstances to induce the Court to disregard the rights and wishes of the father in that respect. I do not think James L.J. went too far in *In re Agar-Ellis* (1) when he said that the law of this country is based on the theory that the responsibility should be with the father; but still that there may be circumstances which compel the Court, having regard to the real welfare of the infants and the conduct of the father, to take away from him the sacred right of controlling the education of his children, or to interfere with his exercise of it, just as it might take away his life or his property or interfere with his

(1) 10 Ch. D. 49; 24 Ch. D. 317. (2) [1893] 1 Ch. 143.

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liberty. But it must be for some sufficient cause known to the law.

In no case, however, that I am aware of, where the father has been alive, has the Court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the Court thought fit altogether to deprive him of the custody of his children. But as a legal proposition it is clear that the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and it also has jurisdiction to decline to change the religion in which the children have been brought up.

It is, therefore, not immaterial to bear in mind what sort of a man this parent was up to a comparatively recent time. I am bound to say that I do not think the order made by the Court in December, 1894, upon the uncontradicted evidence then before it as to the conduct of the father up to that time, was wrong, and I do not think it ought to be discharged. But we have considered the case as if it was open to us to disregard that order, and I proceed to treat the case accordingly. Now this father was an intemperate man, and he has hitherto allowed these children to be brought up as Protestants. But he now says (and I give him credit for saying so truly) that he is converted, and has become a serious-minded man, and that he wishes to change the religious education of his children, and to have them brought up as Roman Catholics. Looking, then, at the authorities, what we have to consider is, whether it is the duty of the Court to enforce the right of the father to have his children brought up in his own religion, or whether circumstances have arisen which render it imperative on us to curtail that right, and to say that, under the peculiar circumstances of this particular case, that right ought to be disregarded.

Now, I am bound to say I think on the whole Kekewich J. has taken the right view. He says that this family having been brought up as Protestants, and the eldest girl being now fifteen or thereabouts, it is plainly far too late to change her religion when she is in a position to choose for herself. The learned

judge has also held that it would be most undesirable, and extremely averse to the welfare of the two little girls, that they should be separated. I think he is justified in coming to that conclusion also. When we bear in mind that, until quite lately, this father never dreamt of bringing up his children as Roman Catholics, but has allowed them to be brought up as Protestants, I think we are bound to say that, having regard to his conduct, this is a case in which he has no right to change the religion in which the children have been brought up. If the case had simply turned on the younger child alone, there would have been more difficulty in it; but although the case is on the line, I think there is ample material to justify us in saying that the learned judge was right, and this appeal ought to be dismissed.

KAY L.J. In this case there can be no dispute whatever as to the law applicable to it. The difficulty arises from the fact that the father is living, and that although he has allowed his children to be brought up as Protestants until the elder of the two girls is fifteen, and the younger eleven, he now desires to alter that state of things. And although the children have become wards of Court, and are under its jurisdiction in that respect, he asks the Court to permit a system of education for them, which it has already sanctioned, to be suddenly and entirely altered, and to direct that henceforth the children should be sent not to a Protestant school, as they have hitherto been, but to a Roman Catholic school to be brought up as Roman Catholics.

Now what is the law applicable to such a case? I take the law from the judgment of James L.J. (than whom no judge ever placed the rights of a father higher) in the case of *In re Agar-Ellis*. (1) He says: "It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property, or interfere with his liberty, but it must be for

(1) 10 Ch. D. 71.

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some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with."

That was a case in which the mother had, without the knowledge of the father (as she herself said in her evidence), caused the children to be trained for some time in the Roman Catholic religion. The father, not knowing of that, desired to have the children brought up as Protestants. They were quite young children, and it was not for very long that they had been educated in the Roman Catholic religion. It was not a case in which it was at all likely that the children had imbibed such strong religious impressions that any great harm would be done to them by making the alteration which the father desired; and the Court refused, in that case, to have any interview with children so young, or to interfere with the rights of the father in directing how they should be brought up in future, and allowed him to be judge in the matter, and to do very much as he chose with regard to bringing them up as Protestants.

Let us see how essentially this case differs from that. The father here is a fish dealer, a man who makes a poor living, as I understand, and who has just enough to provide for himself. Some time ago he married a Protestant wife. She was a Wesleyan at first; but after her marriage she attended the services of the Church of England. All the children were baptised with the father's knowledge and consent in the Church of England as Protestants—one of them even at his own house. At his request the clergyman came over to baptise one of them, who, it seems, was in some danger of dying, as a Protestant child. During the life of the wife the children were always

educated as Protestants; they went to a Protestant school, and even to a Sunday-school, and they attended the worship of the Church of England in the vicinity. The father occasionally went too. There does not seem to have been, on his part, the slightest objection to this state of things. The wife died in 1888. It is said that during her lifetime the father was a man of religious habits, and was a teetotaler, and did not give way at all to habits of intemperance; but after her death he did become a very intemperate man, and on several occasions he was convicted of drunkenness and disorderly conduct, and the last of such convictions was in the month of August, 1894. Now we are asked to believe that a vast change has come over this man since the month of August, 1894—that having been entirely indifferent to the Roman Catholic religion, and having consented to the children being brought up as Protestants to that time, he has now become convinced of the extreme materiality of the Roman Catholic religion, and desires that the children should henceforth be diverted from the faith and education which they have had the advantage of to this time, and should be brought up as Roman Catholics. We are asked to believe that this is a sincere conviction on his part, and that he thinks it for the moral and religious welfare of the children that this change should be made.

Kekewich J., among other things, has had an interview with the elder of these girls who, at that time, was of the age of fifteen years, and in the judgment which has been communicated to us he thus states the result of that interview. [His Lordship then referred to that part of the judgment of Kekewich J., and continued:—]

Now, if this father had not been alive, and if he had died having, in this mode, assented to the education of his daughters and the religious training they have received up to this time, and had not left any expression of his wishes one way or the other, it would, having regard to the welfare of the infants, which then would be the main and paramount, if not the only, consideration for the Court in determining the question, be almost impossible to conceive that any Court having this parental jurisdiction would interfere with the children, and

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alter the course of their religious instruction. The difference is, no doubt, that the father is living, and at this late period of his life, and the advanced period of the life of his children, he has become, we are told, convinced of the extreme impropriety of bringing them up any longer as Protestants. If this had occurred in the converse way, and these children had been brought up as Roman Catholics hitherto, I should have had precisely the same difficulty I have now. Divesting myself entirely of any bias in favour of one Christian religion over the other, I should have felt precisely the same difficulty I have now in interfering with the mode in which the children have been brought up, and effecting now, at the wish of the father, a violent change in their religious training. I think with regard to the elder girl the case comes entirely within the words I have read from the judgment of James L.J. It is a case in which the father's conduct has been such that the Court ought to consider he has "abdicated" his rights, and that it would be a "capricious and cruel" "resumption of his authority" as a father to compel this girl henceforth to be brought up as a Roman Catholic.

There is a little difference as regards the younger girl; but until the case was argued at the bar the father never indicated the slightest intention of making any distinction between the two children. Counsel, of course, see that some more argument may be used in favour of altering the religion of the younger child than could be used in favour of altering the religion of the elder child. There, again, comes in the consideration which Kekewich J. very wisely entertained. These children have always been brought up together; their teaching has always been the same, and the father has assented to it up to this time. He does not, except by the mouth of his counsel at the last moment, intimate the slightest desire to separate one child from the other; and I think he must be treated as having so acted that the Court must control the rights he has in respect of both these children. I therefore regard this case as being within one of the exceptions mentioned by James L.J., and I think the course which the learned judge has taken in declining to interfere with the present training of the children is the

wise, proper, and legal course, and that this Court should affirm his decision. The children are now being educated in a school which the Court has approved of, and they are being educated, in fact, by the person to whom the Court by the order in 1894 gave the custody of the children. That order was made when the father was in a condition, as is amply proved now, which made him totally unfit to have the custody of the children at all. When they were taken from him by friends in the year 1894 they were in a condition of utter destitution, and the money which the trustees of the small fund coming from the aunt's estate had allowed him for the support of the children was not spent in supporting them. They were ill clothed, ill fed, in a neglected condition in every respect, and without any education at that time of any sort or kind. The order was, therefore, in my opinion, properly made. It was an order to last for four years from 1894; two of those years have now expired, and there are only two remaining. I am not at all inclined, under those circumstances, to alter that order. I hope and trust that the father's reformation is one that will last. I think, at any rate, the Court ought to be sure that it will before it alters an order which evidently, under the circumstances, was the only proper order that could be made for the benefit of the children. I think this appeal fails, and must be dismissed with costs.

Solicitors: *Charles Steele; Woodcock, Ryland & Parker, for Greenhalgh & Cannon, Bolton.*

W. W. K.

C. A.
1895
STIRLING J.
Nov. 7, 13.
C. A.
1896
Feb. 4.

In re HUBBUCK.
HART *v.* STONE.

[1895 H. 1071.]

Will — Construction — Power to postpone Sale and Conversion of Estate — Property "not actually producing Income" — Tenant for Life and Remainderman.

The will of a testator contained the ordinary clause empowering his trustees to postpone the sale and conversion of his estate, and declaring that the income thereof, previous to the conversion, should be applied as if it were income arising under investments authorized by the will. Then followed this proviso: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income."

There was a debt, due to the testator at the time of his death, which could not be got in; and the trustees took from the debtor, as security for it, a third mortgage upon certain policies of insurance on his life. The debtor died in the lifetime of a lady who was tenant for life under the will, and the trustees, who had received neither principal nor interest in respect of the debt, realized their security, with the result that, after payment of the prior charges, they received a sum which was less than the amount due by all the interest and some of the capital:—

Held (reversing the decision of Stirling J.), (1.) that according to the rule of the Court this sum represented the arrears of interest as well as the capital, and (2.) that it must be treated as property actually producing income within the meaning of the proviso, and must be apportioned between the tenant for life and the remainderman in the proportion that the interest due from the date of the mortgage bore to the capital thereby secured.

Charles Alfred Hubbuck by his will, dated August 26, 1890, after certain bequests, gave all his real and personal estate not otherwise disposed of on trust for sale, conversion, and investment, and directed his trustees to pay the income of the trust funds to his wife so long as she should remain his widow, and if she should marry again to pay to her an annuity of 750*l.* during her life, and after her death or second marriage upon certain trusts for the benefit of his children or child, and other objects. The will contained a power in the usual form authorizing the trustees to postpone the sale, conversion, and collection of all or any part of the real and personal estate; after which the testator proceeded as follows:—

"And I declare that the net rents and profits or other income produced from every or any part of my real or personal estate previously to the conversion or collection thereof . . . . shall be applied in the same manner in all respects as if the same were income arising from the investments hereinbefore authorized, and that all income produced from my estate in its actual condition for the time being, whether consisting of property or investments of an authorized or of an unauthorized description, and whether of a wasting or permanent character, shall, as well during the first year from my death as at all times afterwards, be applicable as income under the trusts of this my will, no part thereof being in any event liable to be retained as capital. But no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income."

The testator died on December 23, 1890; and at the time of his death, one Ernest Hart was indebted to him in two sums of 2000*l.* and 1500*l.* respectively. The trustees of the will, one of whom was the widow of the testator, being unable to obtain from Hart payment of these debts, on April 1, 1892, took from him a third mortgage of three policies of assurance upon his life as a security for the payment of the 3500*l.* with interest at 4 per cent.

Hart died in November, 1894, and the debt being unpaid and no interest ever having been paid in respect of it, the trustees, on January 9, 1895, realized their security, and recovered the sum of 3669*l.* 14*s.* This sum was, after payment of the prior charges, insufficient to pay the capital of Hart's debt, irrespective of the arrears of interest.

The widow of the testator married again in October, 1895, and this was an originating summons taken out, earlier in that year, by the other trustees of the will against her and one of the persons entitled in remainder, for the determination (inter alia) of the questions how and on what principle the sum recovered ought to be apportioned as between the capital and income of the testator's estate, and what part, if any, of the said sum ought to be paid his widow as income, and what part ought to be retained as capital.

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This summons was adjourned into Court, and came on for hearing before Stirling J. on November 7 and 13, 1895.

Stallard, for the trustees.

Clare, for the widow of the testator. The sum recovered by the trustees was recovered in respect of a debt consisting partly of principal and partly of interest. At the time it was recovered there was a person entitled for life and other persons entitled in remainder, so that it must be apportioned as between capital and income. And in order to arrive at the amounts respectively attributable to income and capital there must be an ascertainment of the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced at the day of the receipt the amount actually received. The aggregate of the sums so ascertained should be treated as capital, and the residue should be treated as income, and applied accordingly: *In re Earl of Chesterfield's Trusts* (1); *Beavan* v. *Beavan* (2); *Turner* v. *Newport*. (3) The only question is whether the declaration in the will which follows the power to postpone the sale and conversion of the real and personal estate takes the case out of these authorities; and I contend that it does not, for this money was in a position to earn income during the continuance of the life interest, and must be treated as actually having done so.

W. M. Cann, for the persons entitled in remainder. The principle upon which the cases cited were decided cannot here be applied, as they are excluded by the terms of the declaration, that "no property not actually producing income, which shall form part of my estate, shall be treated as producing income, or as entitling any party to the receipt of income." This was property which did not actually produce any income at the time of the testator's death, and never has produced any income. No interest ever was paid on the debt; the sum recovered was not enough to pay the principal, and the tenant for life is not

(1) 24 Ch. D. 643. (2) 24 Ch. D. 649, n.
(3) 2 Ph. 14.

entitled to any of it. The clause in this will is almost identically the same as that given in Davidson's Precedents in Conveyancing, 3rd ed. vol. iv. p. 50, and adopted by conveyancers to meet this very kind of case. *Turner* v. *Newport* (1) and the other cases cited were cases of estimation and not of actuality.

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Clare, in reply.

STIRLING J. said that the question which arose in this case between the lady who was entitled to the limited life interest and the persons who were entitled in reversion turned entirely on the words of the will. The question was whether the sum recovered by the trustees was to be treated as a capital sum only, or as consisting partly of capital and partly of income. And, having regard to the words of the will, which were express, his Lordship had to ask himself the question, Have these debts, in respect of which this sum has been recovered, actually produced any income or not? He could only answer, No. Part of the principal even had been lost; and the fund recovered did not include income *actually* produced, though it possibly included what, according to a rule of Equity, might be treated as such; but effect ought to be given to the word "actually." In his Lordship's judgment, according to the true construction of the will, the widow of the testator, as formerly tenant for life under it, was not entitled to any part of this fund, and it formed part of the capital of the testator's estate.

The widow appealed. The appeal was heard on February 4, 1896. C. A.

Clare, for the appellant, after making use of arguments similar to those he addressed to the Court below:—The effect of the decision of Stirling J. is to deprive the appellant of that portion of the fund to which she would be entitled if the ordinary principles adopted by the Court in the administration of assets were applied to the case: *Turner* v. *Newport* (1); *Howe* v. *Earl of Dartmouth* (2); *In re Earl of Chesterfield's Trusts*. (3) And

(1) 2 Ph. 14. (2) 7 Ves. 137, 147.
(3) 24 Ch. D. 643.

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the decision is based entirely upon the words of the declaration in the will that no property not actually producing income was to be treated as producing income. But that clause, like the similar clause in Davidson's Precedents, was intended to meet the case of a reversionary interest, and does not apply here. In a sense this property did actually produce income, for what was recovered represented both capital and income, and not capital only or income only. Supposing that what was recovered had been more than enough to repay the capital. There could have been no doubt that interest had been actually produced; and the fact that less was recovered does not affect the principle, for whatever is recovered by the trustees is recovered by them partly on account of principal and partly on account of interest. Part of it is income produced during the life of the tenant for life and before she married again, and it ought to be apportioned accordingly.

[He also referred to *Cox* v. *Cox* (1); *Ackroyd* v. *Ackroyd* (2); *In re Duke of Cleveland's Estate* (3); *In re Morley*. (4)]

W. M. Cann, for the remaindermen, used the same arguments as in the Court below, and, in addition, contended that even if an apportionment of some kind ought to be made, it should only take place as from April 1, 1892, when the trustees took the security for the debt, and that interest should only be allowed at 3 per cent.

Clare, in reply. The interest ought to be at the same rate as that reserved in the mortgage: *In re Foster*. (5)

Stallard, for the trustees.

LINDLEY L.J., after reading the will down to the declaration at the end of the power authorizing the trustees to postpone the sale and conversion of the estate, continued:—That is a provision to get over the decision in *Howe* v. *Earl of Dartmouth* (6) and to enable the widow to take the income whatever it is. Then come these words: "But no property not actually producing income which shall form part of my estate shall be

(1) L. R. 8 Eq. 343.
(2) L. R. 18 Eq. 313.
(3) [1895] 2 Ch. 542.
(4) [1895] 2 Ch. 738.
(5) 45 Ch. D. 629.
(6) 7 Ves. 147.

treated as producing income or as entitling any party to the receipt of income." What does that mean? That is put in evidently for the protection of the remaindermen, in order to prevent the tenant for life requiring any income not actually earned to be made good at the expense of capital. It would protect the remaindermen, for instance, in the case of the income not being sufficient to pay the annuity. The effect of Stirling J.'s order is, though I did not see it at first, to take from the tenant for life that which according to the rules of this Court is income, and to give it to the remaindermen, and thus to produce a result which is just the reverse of what was intended or contemplated.

The position of affairs to which we have to apply this clause is this. The testator had a debt owing to him of 3500*l.* That debt could not be got in after his death; and the trustees, doing the best they could, obtained as a security from the debtor certain policies of assurance, subject to certain prior charges already existing. After the testator's death and before the widow married again they realized their security, and, after paying off the prior charges, the security produced a sum of somewhere about 3000*l.*; that is to say, less than what was due on the security—less by all the interest, and less by a portion of the capital.

Now what does the sum realized by the security represent? If this question were put to any commercial man, or any accountant or lawyer, he would say that it represents both the arrears of income and the capital, that it ought to be apportioned, and that, after so much had been apportioned for the amount of interest due, the rest would be capital.

In that state of things, but for this clause in the will, so much of that money as represents income would go to the tenant for life, and the security would have actually produced it. It produces the money, and if some of the money has to be treated as income it produces income. It is now said that so much of that money as is income is to go from the tenant for life to the remaindermen to whom it does not belong. When the question is grappled with it appears to me that Mr. Clare was right in saying that the sum now in question has produced

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income during the life of the tenant for life and before she married again.

We must allow this appeal, and declare that the defendant, the widow, is entitled to have the residue of that sum of money apportioned between capital and income in the proportion of what was due in respect of income and what was due in respect of capital. The costs will come out of capital.

KAY L.J. Out of respect to Stirling J., from whom we are differing, I will add a few words.

The sum which has been realized from the security taken by the trustees after the testator's death for a debt due to him is not sufficient to pay the capital of that debt. The debt was 3500*l.*, and the net sum realized is only about 3000*l.* What was due was not merely the sum of capital, but an arrear of interest which accrued during the lifetime of the tenant for life. The ordinary rule of the Court is to be applied to that first of all. What is that sum which has been recovered? Is it capital or is it income, or is it partly capital and partly income? By the settled rule of the Court that sum recovered is partly capital and partly income. We cannot possibly alter that. That is the ordinary rule, and is a very well settled rule. That is independent of the will and without looking at the will at all. In that state of things we have to apply the will. Now I find that the will gives to the widow the income produced by the testator's residuary estate, of which this debt formed part, whatever it may be. Whether any portion of the estate is a wasting security or not the actual income of the whole residue is given to the widow as long as she remains the testator's widow, and if she marries again then she has an annuity. As I have said already, this sum was realized while she was his widow, and the whole arrear of income is an arrear of income which accrued due while she was a widow. Therefore, primâ facie, it cannot for a moment be denied that the widow, as the tenant for life, was entitled to so much of this sum as represents income. Is there anything in this will which alters that? If there be, the effect of it is, as has already been said, to give to the remaindermen that which is income, and which primâ facie

belongs to the widow. Where is there anything in this will which does that? The clause relied on is in these words: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income." Did this sum produce income or not? Here is this sum realized during the lifetime of the widow and tenant for life, part of which is income and part of which is capital. If that is not producing income, I do not know what the words mean. That security, being realized, has produced income. We cannot say that this clause applies because the security did not produce income. Then does this clause mean that if the security does produce income, although it does not produce it year by year, but produces it after a delay and a lapse of time, during which there was no income made—can we say the effect of this clause is to give the income to the remainderman and take it away from the tenant for life? I cannot find a word in the will to that effect. The clause seems to me to be intended as a protection to the remainderman in cases of this kind. Suppose there was some investment which could not well be realized, and which produced no income at all; and suppose the widow were to say, "I am entitled to have that valued as from the death of the testator, and have 4 per cent. out of the capital as my income on that." This clause, I think, is meant to meet such a case as that. The answer would be you are not entitled, where the investment produced no income whatever, to have an imaginary income paid to you out of the capital at the expense of the remainderman. But that is not this case. Another mode of illustrating the case is this. Suppose this mortgage money realized produced enough to pay both principal and all the arrear of interest. Could the remainderman say, "I will take the whole fund, both principal and interest"? It seems to me impossible. If he could not in that case, why should he take part of the fund which is a portion of the income to which primâ facie the tenant for life is entitled? With deference to the judgment of Stirling J., I think this will does not touch the particular facts that have happened in such a way as to deprive the tenant for life of this income, which by the

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rule of the Court she is entitled to, and to give it to the remainderman. It would be totally contrary to the meaning of this provision of this particular will. I therefore agree that the decision of Stirling J. must be reversed.

A. L. SMITH L.J. The whole ground has been fully covered by what has been said by the Lords Justices who have preceded me, and I have nothing to add, except to say that I entirely agree with them.

Their Lordships accordingly made a declaration that the residue of the sum of 3669*l.* 14*s.* ought to be apportioned between capital and income in the proportion that the interest due from the date of the mortgage of April 1, 1892, bore to the 3500*l.* thereby secured, and ordered that the costs of all parties should be paid out of the capital.

Solicitors: *Few & Co., for A. J. Hart, Eastbourne; F. G. Evan Jones; Stones, Morris & Stone.*

W. W. K.

C. A. 1896 *March* 5, 6.

KENNEDY *v.* DE TRAFFORD.

[1895 K. 8393.]

Mortgage—Power of Sale—Sale to one of several Mortgagors—Tenants in Common—Purchase-money—Principal, Interest, and Costs—Redemption—Purchase by one co-Tenant—Principal and Agent—Fiduciary Relation—Trust—Duties of Mortgagee.

In the case of a mortgage by several tenants in common, the mortgagee is at liberty, under his power of sale, to sell to any one of the mortgagors for his own benefit, without any notice to or consent of his co-mortgagors, provided the sale is made under a proper and bonâ fide exercise of the power of sale. Nor is the mere circumstance that the sale is for the amount due for principal, interest and costs a ground for impeaching it as being, in effect, a redemption for the benefit of all the mortgagors. Neither is the validity of the sale affected by any fiduciary relation subsisting between the purchasing mortgagor and his co-mortgagors, such as may have arisen from his having, as their agent, received the rents, paid

thereout the interest on the mortgage, and generally managed the property.

Farrar v. *Farrar's, Limited* (40 Ch. D. 395), explained.

The extent of the fiduciary relation between mortgagor and mortgagee considered.

There is no fiduciary relation between co-tenants of real estate prohibiting one of them from buying or getting in, for his own benefit, an outstanding incumbrance or estate therein.

Van Horne v. *Fonda* (5 Johns. Ch. (N.Y.) 388) not followed.

APPEAL from the Vice-Chancellor of the Duchy of Lancaster.

By an indenture, dated September 18, 1873, a large block of freehold property situate in Deansgate, Manchester, and consisting of two hotels and several shops, was sold and conveyed to Hugh Carswell and Joseph Bottomley Dodson as tenants in common in fee simple for 50,000*l.*

By an indenture dated March 1, 1877, Carswell and Dodson mortgaged the property to Sir Humphrey de Trafford, Bart., in fee for 60,000*l.*, and interest at 4½ per cent. per annum, the proviso for redemption being that on payment by Carswell and Dodson, or either of them, of the 60,000*l.* and interest on the day named, Sir H. de Trafford, his heirs or assigns, should, upon the request and at the expense of Carswell and Dodson, or either of them, reconvey the premises "unto the said H. Carswell and J. B. Dodson, their heirs and assigns, as tenants in common, or as they shall direct." The mortgage contained a power of sale and other usual powers and provisions, including a proviso that the power of sale should not be exercisable until after six months' notice in writing to pay off.

From the time of the purchase by Carswell and Dodson in 1873, Dodson, who was an estate agent, undertook, by arrangement with Carswell, the management of the property, received the rents, paid the outgoings and the interest on the mortgage debt, and from time to time made payments to Carswell on account of his share in the property.

In December, 1883, the mortgagee, Sir H. de Trafford, becoming somewhat anxious as to the value of the security, pressed the mortgagors, through his solicitor, to reduce the amount of the mortgage debt, and also made some inquiry into the value of the security; but on being advised by a valuer that

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for the present the mortgage might be left at 60,000*l.*, he did not then press the mortgagors further.

On May 4, 1886, Sir H. de Trafford died, having made a will appointing executors.

On August 9, 1886, Carswell was adjudicated bankrupt, and on November 4, 1886, the executors, the mortgagees, in pursuance of the provision in the mortgage deed, served Dodson, and also Carswell's trustee in bankruptcy, with a six months' notice calling in the mortgage debt. At the expiration of the notice the mortgagees did not at once proceed to a sale; but, after communications with the mortgagors, by interviews and otherwise, it was arranged that the mortgagors should take steps either to repay or reduce the mortgage debt, or to find a purchaser of the property. Nothing, however, was done beyond a few payments being made by Dodson from time to time out of the surplus rents in reduction of the principal, he having continued to receive the rents as before under an arrangement with his co-mortgagor, Carswell's trustee in bankruptcy. The mortgagees then proposed to exercise their power of sale, but found, upon consulting a surveyor, that it was improbable that the property would, upon a sale by auction, realize sufficient to pay the amount of principal, interest and costs; and, therefore, in December, 1888, they advertised it for sale by private tender, but without success. Ultimately, Dodson offered to purchase the property himself for the amount of principal, interest and costs, provided the greater part of the purchase-money was allowed to remain upon mortgage; and this offer the mortgagees agreed to accept if they should find it impossible to obtain a higher price elsewhere. This they were unable to do, and accordingly it was arranged that the property should be sold to Dodson upon the terms he had offered. The sale was carried out by an indenture of May 16, 1889, whereby Sir H. de Trafford's executors, purporting to exercise their power of sale as mortgagees, conveyed the property to Dodson for 58,806*l.*, the amount of principal, interest and costs, Dodson paying 4806*l.* down, and giving the executors a mortgage for the balance, 54,000*l.* At that time a Dr. John Kennedy was Carswell's trustee in bankruptcy, and it appeared that at

Dodson's request the fact of his being the purchaser was not disclosed to Dr. Kennedy until September, 1891, when Dr. Kennedy's solicitors wrote to the mortgagees' solicitor proposing to redeem, and they were then informed that the property had already been sold to Dodson. Dr. Kennedy's solicitors made some complaint that they ought to have been informed of the sale to Dodson before; but no steps were taken to impeach the transaction until May, 1895, when Dr. Kennedy commenced this action in the Manchester District Registry against Sir H. de Trafford's executors and Dodson to have the sale set aside, and for a declaration that, notwithstanding the form of the conveyance of May 16, 1889, the plaintiff was now interested with Dodson in the equity of redemption, and entitled to redeem the defendants, the mortgagees; redemption of the defendants, the mortgagees, and a sale; and in the alternative, damages against the mortgagees for negligence in the alleged exercise of their power of sale.

In his statement of claim the plaintiff alleged that the so-called sale to Dodson had been arranged and contrived by him for the purpose of paying off a portion of the mortgage then subsisting, and fraudulently excluding the plaintiff, as Carswell's trustee in bankruptcy, from his interest or equity of redemption; that the transaction was not authorized by, nor was it a due exercise of, the power of sale contained in the mortgage, and that it was not effective in law for the purpose of barring the plaintiff's equity of redemption; that, in the alternative, and if the alleged sale was effective to bar the plaintiff's right of redemption, the defendants, the mortgagees, had acted negligently in the exercise of their power of sale, and taken no steps to obtain the best price for the property; that the defendant Dodson had refused to account for the rents and profits since his alleged purchase and was wrongfully converting them, and had denied the title of the plaintiff to Carswell's share therein. In his defence Dodson insisted that the sale to him was made bonâ fide and for full value, after frequent but unsuccessful attempts on the part of the mortgagees to realize the property; and he denied that the sale was a mere contrivance for fraudulently or improperly excluding the plaintiff from any

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alleged co-partnership interest (the existence of which the defendant denied), or from his equity of redemption. He also pleaded laches and acquiescence, and the Statutes of Limitation.

The defendants, the executors of Sir H. de Trafford, also put in a defence, insisting that they had acted with entire propriety in the sale to Dodson, had taken all necessary advice as to the value of the property prior to effecting the sale, and had taken all reasonable and proper steps to dispose of the property at a fair price, and that the best, and in fact the only, offer to purchase was by Dodson upon the terms carried out by the deed of May 16, 1889; that they gave the plaintiff ample opportunity either to redeem the property or to sell it or to find a purchaser, which the plaintiff utterly failed to do; and they also pleaded acquiescence, laches, and the Statutes of Limitation.

The action came on for trial on vivâ voce evidence before the Vice-Chancellor of the Duchy of Lancaster, in November, 1895, when, in delivering judgment, he observed that there was no suggestion that the mortgagees had not acted bonâ fide, or that there had been any corruption or collusion on their part, or that the sale itself had been at a gross undervalue. He, however, came to the conclusion that Dodson had used his position unfairly, and had thereby obtained a private benefit for himself to the attempted exclusion of his co-owner; and made a declaration that under the circumstances the alleged sale of May 16, 1889, was not a due and proper exercise of the power of sale vested in the mortgagees, and ought to be set aside accordingly, and that Dodson was not entitled to retain the benefit of it; with the usual redemption decree as between one tenant in common with a co-owner as defendant; the defendants to pay the costs of the action, except so far as regarded a second issue, whether Dodson could, by reason of the fiduciary relation in which, as the Vice-Chancellor held, he stood towards his co-owner, retain the benefit of the sale; those costs to be paid by Dodson personally.

The defendants appealed.

The appeal was heard on March 5 and 6, 1896.

Warmington, Q.C., and *T. Clarkson*, for the defendants, the executors of Sir Humphrey de Trafford. The plaintiff makes no charge of fraud or gross undervalue, but seeks to set aside the sale on the ground that the executors might have taken certain steps which they did not take, and that the price which they obtained was less than the proper value of the property. They say, in effect, that the executors should have kept the property, or, if they sold it at all, that they should have sold it by auction. But this was a bonâ fide sale by mortgagees under their power.

[KAY L.J. A mortgagee has a right to choose his own way of exercising his power; and even if he bonâ fide sells by private contract, after being told that he had better sell by public auction, that would not invalidate the sale.]

No doubt: and the Vice-Chancellor himself said that the executors had acted bonâ fide, and that there was no suggestion of corruption, collusion, or fraud on their part. But he seems to have considered that they did not take reasonable precautions to obtain a proper price, and that the case came within the principle of the decisions in *Farrar* v. *Farrar's, Limited* (1), and *Warner* v. *Jacob*. (2) But this is a very different kind of case. There are no suspicious circumstances here. The mortgagees looked after their own interests, as they were entitled to do; but there was no sacrificing of the mortgagors' property. We contend that there is no ground whatever for setting aside this sale.

[They also referred to *Davey* v. *Durrant*. (3)]

Astbury, Q.C., and *G. Dodson*, for the defendant Dodson. The case made against this defendant was based upon (1.) undervalue, (2.) want of proper precautions, and (3.) the existence of some imaginary fiduciary relation between Dodson and his co-mortgagor. But the evidence shews clearly that no higher price could have been obtained for the property at the time of the sale, and that the sale was a perfectly bonâ fide and unimpeachable transaction; while, as to the supposed fiduciary relation, none such existed; and according to English law there

(1) 40 Ch. D. 395. (2) 20 Ch. D. 220.
(3) 1 De G. & J. 535.

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is no impropriety whatever in a mortgagee selling to one of two co-mortgagors. (1)

[They were stopped by the Court.]

Farwell, Q.C., P. O. Lawrence, Q.C., and *Maberly*, for the plaintiff. First, the transaction was not a bonâ fide sale of the property by the mortgagees under their power of sale. The Vice-Chancellor has found, upon the facts, after seeing and hearing the witnesses, that the mortgagees took no "reasonable precautions," within *Warner* v. *Jacob* (2) and *Farrar* v. *Farrar's, Limited* (3), to obtain a proper price from an independent purchaser; and also that Dodson, the purchaser, stood in a fiduciary relation to the plaintiff, his co-owner; and the rule now is that this Court will assume the facts found by the judge in the Court below on trial without a jury to be right: *Colonial Securities Trust Co.* v. *Massey*. (4)

Secondly, this was in reality not a sale at all, but a redemption. One of two owners of an equity of redemption cannot redeem to the exclusion of the other: he must give his co-owner the benefit of the redemption, and cannot evade that duty by calling the transaction a sale: *Pearce* v. *Morris* (5); *Magnus* v. *Queensland National Bank*. (6) One of two mortgagors who merely pays off principal, interest and costs does in fact redeem, and cannot oust his co-owner by pretending that the transaction is a sale.

[KAY L.J. According to your argument, if 5*l.* over or under the amount of principal, interest and costs is paid to the mortgagee, it is a sale; but if the exact amount is paid, then it is a redemption. That is to say, the mortgagee may sell for more, or he may sell for less, but he cannot sell for the exact amount.]

At all events, upon principle, we submit that one tenant in common cannot purchase the entire interest in the joint estate for his exclusive benefit as against his co-tenant; his purchase

(1) As to the title of a second mortgagee purchasing from the first mortgagee under the power of sale, see *Shaw* v. *Bunny*, 33 Beav. 494; 2 D. J. & S. 468.

(2) 20 Ch. D. 220.
(3) 40 Ch. D. 395.
(4) [1896] 1 Q. B. 38.
(5) L. R. 6 Ch. 227.
(6) 36 Ch. D. 25; 37 Ch. D. 466.

must enure in equity for the common benefit: per Chancellor Kent in *Van Horne* v. *Fonda* (1); Kent's Commentaries, 12th ed. vol. iv. p. 371 (*c*). That case is not discussed in any English report or text-book; but the doctrine has been applied in England in the analogous case of the renewal of a lease: *Keech* v. *Sandford* (*Rumford Market Case*) (2); *Palmer* v. *Young* (3); *Hamilton* v. *Denny*. (4)

Again, as Dodson was manager or bailiff for his co-mortgagor, and therefore stood in a fiduciary relation towards him, he was precluded from taking advantage of his position by excluding his co-owner from any profit arising from the transaction.

[KAY L.J. You seek to make out a fiduciary relation because one tenant in common received the rents.]

It is like the case of a landed proprietor who appoints an agent. An agent cannot buy behind the back of his principal. Dodson was buying by arrangement with the mortgagees, who were aware that he was bailiff or manager for his co-owner; the mortgagees were therefore bound to see that in the conveyance of the property the right of his co-owner was kept alive: *Adams* v. *Angell* (5); *Otter* v. *Lord Vaux*. (6)

[KAY L.J. A. sells property to B., knowing B. is the agent of C.; can C. set that sale aside, and say to the vendor, "You cannot sell to my agent"?]

We cannot put the argument as high as that.

[KAY L.J. Or can he even get the benefit of the sale?]

We submit that the agent is precluded by virtue of his position from making a profit for himself. If this transaction was, as we contend it was, a redemption and not a sale, the property ought to have been conveyed to the two co-owners, as stipulated for in the proviso for redemption in the mortgage deed, both being equally entitled to redeem.

LINDLEY L.J. This is an appeal against a judgment of the Vice-Chancellor of the Duchy of Lancaster declaring a sale by mortgagees under their power of sale to be invalid, and giving

(1) 5 Johns. Ch. (N.Y.) 388, 407.
(2) 1 W. & T. 6th ed. pp. 53, 58.
(3) 1 Vern. 276.
(4) 1 Ball. & B. 199.
(5) 5 Ch. D. 634.
(6) 6 D. M. & G. 638, 643.

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consequential relief: and the question is whether that judgment is right.

The mortgage containing the power of sale which has been exercised was a mortgage to Sir H. de Trafford, by two tenants in common, of property in Manchester, for 60,000*l.*, and the sale was by his executors. The proviso for redemption in the mortgage deed was in the usual form, and the power of sale was also in the usual form: there was a provision that six months' notice was to be given before exercising it, and that condition was complied with. I merely mention that to shew that the mortgage contained the usual power of sale, and that there was nothing special about it.

Now, what the mortgagees did was this: in May, 1889, they purported to sell this property under that power of sale to one of the mortgagors for the amount of principal, interest and costs. That is the transaction complained of. Mr. Farwell has invited us to affirm a proposition which is entirely new to me, and which is, that such a transaction as that cannot stand in point of law: that is to say, that if several tenants in common of property mortgage that property, and confer upon the mortgagee a power of sale, a sale to one of the mortgagors for principal, interest and costs cannot be maintained under any circumstances, or, at all events, without the consent of the others, or without notice to them. Of course, if that is right away goes this sale, because this was precisely a sale of that description. But is that right? As I have said, the proposition has the merit of novelty: there is no authority discoverable in support of it, and on principle it appears to me to be untenable. Just consider how such a doctrine as that would affect the mortgagee—how it would fetter him in the exercise of his power of sale. It might be—and I think this case is itself an illustration of it—that if that doctrine were sound the mortgagee never could exercise his power of sale at all. I am not aware of any authority or of any principle which goes that length. The mortgagee is entitled to sell to anybody who can buy, provided, of course, that he deals fairly and properly in the ordinary way. I see no ground whatever for excluding any mortgagor, if there happen to be several, from buying. It may be one of the very

best protections for the mortgagee that he should be able to sell to such a person if he cannot find a better purchaser.

Now, upon that broad point, which, so far as I can see, was not even submitted to the Vice-Chancellor, nor was it alluded to in any way in his judgment, it seems to me that the sale can be supported.

Treating this, therefore, as a possible exercise of the power of sale, is there any ground for impeaching it? Mr. Farwell has suggested that this is merely a redemption by one mortgagor in disguise; but, looking at the facts, it is quite obvious that Mr. Dodson, the purchaser, was not redeeming, and was not in a position to redeem. The mortgagees never would have got a farthing out of him in any way of redemption, and it is not in accordance with the facts to say that this was a redemption. I am not prepared to say that it is impossible in point of law for a mortgagor, or one of several mortgagors, to buy at a price just sufficient to enable the mortgagee to satisfy himself. If we were to hold such a purchase to be impossible, this absurdity might follow, that, if the purchase-money was 5*l.* more or 5*l.* less, the doctrine would not apply. If this is in fact a sale, I do not think there is anything to compel us to say that it must be a redemption. But was it a sale? I think the evidence is conclusive that it was. Both parties intended it to be a sale, and for the best possible reason —that redemption could not have been got.

Now, upon what ground can the sale be impeached? The Vice-Chancellor begins his judgment by referring to the cases of *Warner* v. *Jacob* (1) and *Farrar* v. *Farrar's, Limited* (2), which contain the principles applicable to this case, and then he says: "Now in this case it is not suggested that the mortgagees did not act bonâ fide; and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an undervalue so gross as to be in itself evidence of fraud." If that is so, and I am satisfied it is, upon what ground can the sale be set aside? It is very difficult indeed to see how it can be set aside, but on an examination of the Vice-Chancellor's judgment I think I see what led him to

(1) 20 Ch. D. 220. (2) 40 Ch. D. 395.

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set it aside. He was led to do so—and I think he was a little misled—by some language which I used in delivering the judgment of the Court in *Farrar* v. *Farrar's, Limited* (1), where I said this: "If in exercise of his power he"—that is, the mortgagee—"acts bonâ fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Now, the Vice-Chancellor has come to the conclusion that reasonable precautions to obtain a proper price were not used. The reason why these words were added was this: A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all. If it could be said in this case that the mortgagees had done any of those things, I can understand setting aside the sale; but when one comes to the facts it appears to me that, instead of not taking "reasonable precautions," in the sense in which those words are used in *Farrar* v. *Farrar's, Limited* (1), to obtain a purchaser at a good price for this property, the mortgagees, through their solicitor, acted from first to last in an honourable and businesslike manner, without in the least sacrificing the interests of the mortgagors. It is impossible to look at the facts without seeing that the mortgagees gave these mortgagors every possible opportunity of transferring the mortgage, of reducing the mortgage, or of selling if they could. [His Lordship then stated the facts of the case down to the negotiations for the purchase by Dodson in May, 1889, and continued:—] Then, on May 16, 1889, the property is conveyed by the executors of the original mortgagee to Dodson for 58,806*l.*, of which Dodson pays 4806*l.* down, and gives to the executors a mortgage for the balance, 54,000*l.* That is the transaction impeached. It is impeached upon the broad ground which I have dealt with already, and now I will consider whether upon some narrower ground it can be set aside.

(1) 40 Ch. D. 411.

It has been said that it was the duty of the mortgagees to inform Dr. Kennedy of this negotiation of Dodson for the sale. I confess I do not see that there was any such duty. It is said that Dodson requested the mortgagees not to mention his name as the purchaser. That may have been so, but how does that affect the bona fides of the mortgagees or the validity of the transaction? The real truth is, I suppose, that the creditors of Carswell, or Dr. Kennedy on behalf of the creditors, have found out now that the property is worth more than was given for it, and they are annoyed that Mr. Dodson, the co-mortgagor, should obtain that benefit.

[His Lordship then commented on the plaintiff's delay in taking steps to impeach the sale to Dodson, although he, the plaintiff, was aware of it as far back as September, 1891, and continued:—]

But quite apart from that, I am distinctly of opinion that if this action had been brought a month after the sale to Dodson, the sale could not have been impeached. It appears to me that we should be throwing the greatest possible difficulties in the way of mortgagees if we were to say that these mortgagees had done anything wrong or had failed to take any step which was reasonable and proper in such a transaction as this. That there should be every facility for realizing mortgage securities is for the benefit both of those who want to borrow money on mortgage and of lenders. If mortgagees cannot realize their securities with comparative ease and safety, who would lend money on mortgage, and what would become of owners of property if their facilities of borrowing were destroyed by a strict, rigid application to powers of sale of principles which may possibly rest on very refined equities, but which are utterly inapplicable to ordinary business purposes?

It appears to me, therefore, that there is nothing at all amiss with this sale, and on that ground the judgment of the Vice-Chancellor must be reversed.

Then as regards Dodson it is said, "Well, be it so; but you, Dodson, at all events made some profit out of this transaction which you ought to account for to Dr. Kennedy as owner of the other half of the mortgage." The sale to Dodson was not

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a sale to him in a fiduciary character. We are asked to say (and the point is an important one) that one of several tenants in common cannot get in, for his own benefit, an outstanding incumbrance, or an outstanding estate, or cannot be treated as otherwise than as a fiduciary owner, standing in some fiduciary relation to his co-tenant. As a general proposition that appears to me not to be the law of England. It is very true that in this case Dodson received the rents as the agent of his co-tenant; but to say that for that reason he could not buy is going further than I am prepared to go.

With reference to the American case of *Van Horne* v. *Fonda* (1) decided by Chancellor Kent, all I can say is this: I do not believe myself that there ever was a lawyer of greater attainments, greater judgment, and greater skill in the application of principles than Chancellor Kent; but I do not know how far the law of the State of New York and the law of England are alike in these matters. I believe, however, that in the United States it is generally easier for one co-owner of real property to get a lien on the entirety than it is in this country. Whether that affected the learned Chancellor's view, I do not know; but I am not prepared, on the authority of that case, to say that Dodson can be compelled to account for the profit he may have made out of this sale.

Therefore, my judgment is that the appeal must be allowed, and the action dismissed with costs.

KAY L.J. With deference to the learned Vice-Chancellor, it seems to me that he has put a mortgagee into a more difficult situation than any authority which I know of in our books up to this time has done. Any loan of money on mortgage is, between mortgagor and mortgagee, a simple matter of business. They contract between themselves as to what their mutual rights and obligations shall be in regard to that loan of money. The Court of Equity has persistently refused to find in that relation anything like fiduciary duty on the part of one to the other so long as the mortgage exists. I agree that if the mortgagee realizes the mortgage and receives more than enough

(1) 5 Johns. Ch. (N.Y.) 388.

to pay what is due upon it, then, with respect to the balance, he does stand in a fiduciary position ; or, if he gets the mortgage paid off and has to deal with the property, he must take great care that he reconveys the property to the person who is really entitled. But, except that, so long as the mortgage lasts and the money is due, the mortgagee is not in a fiduciary position, with reference to his powers under that mortgage, to the mortgagor in any sense. I think the learned Vice-Chancellor in this case has treated a mortgagee as being subject to obligations and duties to the mortgagor which, according to my understanding of the law, do not exist at all.

[His Lordship then reviewed the evidence bearing upon the question whether the mortgagees had shewn proper care and precaution in the exercise of their power of sale, and expressed his opinion that every possible consideration had been shewn by the mortgagees to the mortgagors in the way of affording them opportunities of either paying off the mortgage, reducing it, or selling the property. His Lordship then proceeded :—]

Then, what other ground can there be for setting aside this sale? A number of other points were argued. First of all, it was said that Dodson was tenant in common of the equity of redemption of this property with the trustee in bankruptcy of Carswell, his co-mortgagor, and it was broadly argued that a sale by a mortgagee to one of two mortgagors is ipso facto an improper thing. There is no authority for that in any English book that I know of: I never heard the proposition before ; and I cannot conceive that it should be so. It strikes me that it would be a very great disadvantage for people who want to borrow money if there were any such doctrine, because it would except from the possible purchasers of the property under the power of sale one of those who would be most likely to give a good price for it. One of several tenants in common of a mortgaged property would be very likely to give more than a mere outsider would in order to purchase the property. It would be a disadvantage instead of an advantage if that were forbidden by law. But what law forbids it? On what ground could such an order be made? There is no fiduciary relation, nothing which makes a mortgagor unable to buy from

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the mortgagee, that I have heard of. It is quite true that if there be a single mortgagor he has nothing to do but redeem, and if he pays the principal, interest and costs he redeems; but where there are several mortgagors, if one of them agrees to buy under the power of sale, what is there to prevent him? I confess, with all deference to the authority which is cited from the American reports, I do not think that authority is consistent with any law which has been established in England. I hold distinctly that there is nothing whatever in the position of tenant in common of one of several mortgagors to prevent him from buying the mortgaged property under a power of sale contained in the mortgage deed. So much for that point.

But then it was said, and this point was strenuously argued, that this was not in fact a sale at all; that it really was a redemption by one of the mortgagors; that Dodson only paid principal, interest and costs; and that payment by one of several mortgagors of principal, interest and costs is merely a redemption by that mortgagor. To my mind nothing can be clearer than this, that if Dodson had been asked to redeem at this price he would not have listened to the proposal. What he wanted to do was to obtain the property as his own. There is not one word in any part of the evidence as to the negotiations about treating this as a redemption; and that the parties never intended redemption, but did intend a bonâ fide sale under the power of sale, is absolutely undeniable. If then the parties intended the transaction to be a sale under the power of sale, is there any rule of law which limits it to a redemption? The mortgagees want to exercise the power of sale. They find the only way in which they can possibly get their money is by selling the property out and out to one of the mortgagors. They agree with that mortgagor to sell it to him out and out under their power of sale, and it is sold on these terms. What turns that into a redemption which was intended by both parties to be a sale? It was admitted that if this purchase-money had been slightly above or slightly below the amount of principal, interest and costs, it could not have been redemption: and can that which is intended to be and is carried out as a

bonâ fide sale be said to be redemption because the amount of the purchase-money, which is all the mortgagee can get from any one, happens to be the same as the amount of principal, interest and costs? I am not in the least impressed by that argument. It seems to me that this was not a redemption in any sense, but that it was intended to be a bonâ fide sale of the property under the mortgagees' power of sale.

Then another point was argued. It was said that Dodson was in a fiduciary position, and that was sought to be made out in this way. Dodson was one of the two tenants in common of the equity of redemption; Dodson, by arrangement between himself and the representative of Carswell, received the rents; out of those rents he paid the interest on the mortgage; he also, it is said, managed the property, that is to say, he seems to have arranged with the tenants who took leases of the property, but of course he could not let it, for he had no power of letting without the concurrence of the co-mortgagor: that is all, and that is the only way in which any suggestion can be made of a fiduciary relation between Dodson and the representative of Carswell. Now, is that a fiduciary relation which prevented Dodson from buying? I understand the argument being pushed to this extent—though I do not agree with it—that Carswell's representative might claim to share in the advantage of the purchase: but how can that affect the validity of the sale? To affect the validity of the sale you must shew that there was a fiduciary relation between Dodson and the mortgagees. That was out of the question, as I pointed out: there was nothing like it. Therefore, how any fiduciary relation between Dodson and the representative of Carswell can affect the validity of the sale, I am totally at a loss to conceive. In my opinion it did not do so in any way, supposing that fiduciary relation to exist, though I do not mean for a moment to express any opinion that a claim against Dodson by Dr. Kennedy on that ground could be supported. [His Lordship then dealt with the question of delay, holding, upon the facts, that the plaintiff had been guilty of laches in having taken no steps to impeach the sale, from September, 1891, when he became aware of the sale, until May, 1895, when he issued the writ in

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this action; and that the mere fact of the name of the purchaser having been withheld at the time of the transaction gave him no right to impeach the sale. His Lordship concluded:—] In my opinion the mortgagees are entitled to the judgment of the Court. Their conduct, from first to last, has been entirely without any circumstance whatever which could throw the least doubt upon the validity of the sale. I therefore think that the decree which ought to have been made in this case was to dismiss the action with costs.

A. L. SMITH L.J. dealt more especially with the facts of the case, and, after reviewing the evidence, came to the conclusion that the sale to Dodson was honest and bonâ fide, and ought not to be set aside.

Appeal allowed, and action dismissed with costs.

Solicitors: *Taylor, Kirkman & Colley, Manchester; Boote & Edgar, Manchester; Croften, Craven & Worthington, Manchester.*

G. I. F. C.

C. A. 1896 *March* 9.

In re BENNETT. JONES *v.* BENNETT.

[1895 J. 246.]

Partnership—Retiring Partner—Audit—Stock-taking—Accountants—"Costs, Charges and Expenses"—Trustee—Administration—Capital and Income.

A partner, on retiring from his firm, left his capital, 15,000*l.*, in the business under an agreement with the continuing partners that it should be a debt due from them to him and bearing interest until repayment. The agreement contained a stipulation that the outgoing partner should have free access to the books at all times, and various provisions intended to satisfy the outgoing partner from time to time of the solvency of the business; upon breach of any one of these provisions he was to be at liberty to call in his capital. The outgoing partner subsequently died, having by his will bequeathed his residuary estate, which included his capital in the business, to a trustee upon trusts for one for life and for others in remainder:—

Held, that the trustee was at liberty to employ accountants and valuers for an audit and stock-taking once a year, if desired, or oftener if special

circumstances so required; and that the expenses thereof were costs, charges and expenses properly incurred by the trustee in the execution of the trusts of the will and for the benefit of the whole estate, and were therefore payable out of capital and not out of income.

APPEAL from the Vice-Chancellor of the Duchy of Lancaster.

For many years prior to 1894 Robert Bennett, Thomas Walton and John Whitehead Marshall had carried on business in Liverpool as wine and spirit merchants in partnership under the style of "George Bennett & Sons." In 1894, the partnership being about to expire by effluxion of time, and the testator desiring to retire from the business, and Walton and Marshall to continue it, an agreement dated April 10, 1894, was entered into between Bennett of the one part, and Walton and Marshall of the other part, whereby it was agreed (clause 1) that Bennett should retire from the business in favour of Walton and Marshall as from February 16, 1894. Clause 2 was as follows: "The capital of the said R. Bennett in the said firm on the said 16th day of February is to be taken as settled and ascertained at the sum of 15,772*l.* 4*s.* 10*d.*, and such capital sum is to be considered as money lent by the said R. Bennett to the said T. Walton and J. W. Marshall on the 16th day of February, 1894, at interest at the rate of five per centum per annum from that day, and such interest is to be paid by equal half-yearly payments . . . . and the said capital sum of 15,772*l.* 4*s.* 10*d.* is to be paid by the said T. Walton and J. W. Marshall to the said R. Bennett on the 16th day of August, 1904." Then followed a provision enabling Walton and Marshall to pay off the capital in sums of not less than 1000*l.* at a time. By clause 4 Bennett agreed to let and Walton and Marshall agreed to take the business premises, which belonged to Bennett, for ten years from February 16, 1894, at a specified rent, with liberty for Walton and Marshall to determine the tenancy at the end of any year on giving six months' previous notice in writing.

Then came the following clauses:—

"11. The said T. Walton and J. W. Marshall shall on the 31st day of December, 1894, and on the 31st day of December in every succeeding year of the said tenancy, produce and shew to the said R. Bennett the balance-sheet of the business carried

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on upon the said premises during the then preceding year, and all books and documents in relation thereto, and permit him to make copies of and extracts from the same at his discretion; and the said R. Bennett shall at all times have free access and full liberty to inspect and examine the stock of wine and spirits, and inspect and take copies of or extracts from all and every or any of the account-books, balance-sheets and documents relating to the business carried on upon the said premises in the name of George Bennett & Sons, or any name substituted therefor."

"12. These presents are upon the express condition that if and whenever any part of the said rent and interest, or either of them, shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, or if and whenever the said T. Walton and J. W. Marshall, their executors, administrators or assigns, or any of them, shall assign or underlet the said premises or any part thereof . . . . without the previous licence in writing of the said R. Bennett, his heirs or assigns, or if and whenever the said T. Walton and J. W. Marshall, their executors, administrators or assigns, or any of them, shall be adjudged bankrupt or compound with or make any assignment for the benefit of their or any of their creditors; or if and whenever the business conducted upon the said premises shall be carried on at a loss; or if and whenever the balance-sheets or books in connection with the business conducted upon the said premises shall not be clearly and honestly kept; or if and whenever the said T. Walton or J. W. Marshall shall at any time draw out more than his profit of the business to be conducted upon the said premises; or if and whenever the stock of wines and spirits in connection with the business to be conducted on the said premises shall be overvalued compared with the market price of the day; or if and whenever the stock or capital of the business to be conducted upon the said premises shall be employed outside such business; or if and whenever the said T. Walton and J. W. Marshall, or either of them, shall become bail or surety for any other person, firm or company; or if and whenever either the said T. Walton or the said J. W. Marshall shall draw out of the said business to

be conducted upon the said premises in any one year more than the sum of 800*l.* until the whole of the said sum of 15,772*l.* 4*s.* 10*d.* has been repaid; or if and whenever there shall be a breach of any of the agreements by or on the part of the said T. Walton and J. W. Marshall herein contained; the said R. Bennett, his heirs, executors, administrators and assigns, may re-enter upon any part of the said premises in the name of the whole, and thereupon the said tenancy shall absolutely determine, and the said R. Bennett (whether he re-enter or not) shall in every or any of the events aforesaid, or in the event of notice being given under clause 4 hereof to determine the tenancy, be entitled to demand and recover immediate payment of the said sum of 15,772*l.* 4*s.* 10*d.*, or so much thereof as there remains owing."

Then followed various other clauses, including a clause enabling Walton & Marshall to purchase, if desired, Bennett's interest in the demised premises.

Shortly afterwards, on September 27, 1894, Bennett died, having by his will, dated in 1890, given his residuary real and personal estate to two trustees in trust for sale, and to invest the proceeds (after paying his funeral and testamentary expenses, debts and legacies) as therein mentioned, and to hold the investments upon trust for and to pay the income to his daughter for life, and after her death to hold the capital upon trust for the persons therein mentioned.

Walton & Marshall had, since the date of the agreement, carried on the business, duly paid the rent for the business premises, and had paid off upwards of 2000*l.* of the capital sum of 15,772*l.* 4*s.* 10*d.*, together with all current interest due.

In administering the estate of the testator, of which his interest under the agreement constituted the chief remaining asset, the sole acting trustee and executor of the will, in order to ascertain from time to time whether the principal moneys remaining owing under the agreement had become payable under clause 12, considered it necessary that an independent audit of the books and stock-taking of the business should be made at least once every year by duly qualified accountants and stock-valuers; and by his direction one such audit and stock-taking had already been made in December, 1894, the expense

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of which was about 213*l*. Being, however, in some doubt as to the extent of his powers in this respect, he presented this originating petition in the Palatine Court asking for the determination of the questions (1.) whether he should continue to have such audit and stock-taking once every year, or at any other or what intervals; and (2.) how the expense of the audit and stock-taking which had already taken place, and any future audit and stock-taking which might be authorized by the Court, ought to be borne, and whether out of capital or income. The tenant for life and reversioners were made respondents to the petition.

There was no action pending for the administration of the testator's estate.

The petition was heard on November 25, 1895, by the Vice-Chancellor of the Duchy of Lancaster, who made an order declaring that the petitioner ought to have an audit and stock-taking once every year, and once a year only; that the expenses already incurred in the first audit and stock-taking ought to be paid out of corpus, and that the expenses of future audits and stock-taking ought to be paid out of income. The respondent, the tenant for life, appealed against so much of the order as directed (1.) that there should be an audit and a stock-taking once every year, and once a year only, and (2.) that the expenses of future audits and stock-takings ought be paid out of income.

Cozens-Hardy, Q.C., and *A. Rutherford*, for the tenant for life. As to the first point, the trustee should not be tied down to an audit and stock-taking once a year. This is a matter which should be left to his discretion, so that he may have an audit and stock-taking whenever he feels any doubt or suspicion as to the security of the capital left by the testator in the business. Clauses 11 and 12 of the agreement are expressly intended to provide for the safety of this capital.

As to the second point, the expenses of the audits and stock-takings, being for the benefit of the entire estate, should be thrown on corpus. They may be regarded as "testamentary expenses," which the testator has directed shall come out of corpus.

F. Thompson, and *A. àB. Terrell*, for the reversioners. The expenses in question should be treated as annual outgoings, and therefore as payable out of income. They are analogous to premiums on insurance, which must be paid by the tenant for life who is in enjoyment of the property, just as in the case of an insurance by trustees under s. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53).

P. O. Lawrence, Q.C., and *J. Rutherford*, for the petitioner, the trustee.

Cozens-Hardy, Q.C., in reply. These expenses really come under the head of costs, charges and expenses properly incurred by the trustees for the benefit of the estate, and, therefore, like all other costs, charges and expenses of trustees, are payable out of capital. The opposite view would be very hard on the tenant for life, for the interest she receives will diminish as the debt is paid off, while the costs of the audits and stock-takings will not.

LINDLEY L.J. It appears to me that in this case the Vice-Chancellor has made a mistake in throwing these expenses upon income. The facts are shortly these: [His Lordship stated them, and continued:—] Now, Mr. Bennett left the 15,000*l.* odd in the hands of the continuing partners, and without security; accordingly, what he stipulates for is, in effect, this: "If I am going to lend you this money without security, you must produce the books every year and let me see how the stock stands and how your business is being carried on, so that I may be satisfied as to whether the 15,000*l.* is in a risky state or not, and may consider whether I ought to call in the money or not." That is the substance of the bargain. The trustee of Mr. Bennett's will requires the continuing partners to allow him to see the books, and to have them examined by an accountant and the stock taken. The Vice-Chancellor has said that must be done once a year, and once a year only. In my opinion, that direction is too strict. What he should have directed was that it might be done once a year, but that, in the absence of special circumstances, it ought not to be done more than once a year. And we propose to make a direction in this form. The trustee

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need not require an audit even once a year if he is satisfied; but he may have it more than once a year if he is not satisfied. A direction in this form will leave him a discretion to have it more than once a year, if deemed expedient.

Then the trustee says that in order to make that investigation he will have to employ an accountant at a cost of about 213*l.* The question is, who is to pay for that? In the first place, as between the testator's estate and the surviving partners the expense cannot be thrown upon them: it must be borne by the testator's estate. It does not exactly come under the head of debts or testamentary expenses, but it is much more akin to testamentary expenses than anything else that can be suggested. I think the suggestion made by Mr. Cozens-Hardy was the true one—namely, that an expense of this kind is part of the costs, charges and expenses properly incurred by the executor and trustee in the performance of his duty. Why is this expense to be thrown upon the tenant for life? For whose benefit is it incurred? It is really for the benefit of the whole estate, though the practical effect of throwing it upon the whole estate will be that the tenant for life will lose the income of the sums expended.

It has been suggested that such expenses are like annual outgoings. I do not think they are. By an "outgoing" is generally meant some payment which must be made in order to secure the income of the property. In my opinion, the Vice-Chancellor ought to have decided that the expenses of audit and stock-taking ought to be paid out of corpus, and that no distinction should be drawn between the expenses of the first stock-taking and of future stock-takings. The appeal must therefore be allowed.

KAY L.J. The testator in this case was carrying on business with other persons, and he was about to retire. Having 15,000*l.* of capital of his own employed in the business, he arranges with his co-partners to retire from the business and to leave the 15,000*l.* in the business at interest at 5 per cent. He takes no charge upon the business for the amount. He lets to his co-partners the premises on which the business is being

carried on upon certain terms; and then he makes this provision, which is of great importance upon the question now before us: [His Lordship then read clause 12 of the agreement, and continued:—] The agreement also provides that accounts are to be furnished annually by the continuing partners to the outgoing partner, and that he is to have access to all the books of the firm at any time. Then after this he makes his will and gives his residuary estate to one for life with remainders over, and provides that all the income of his residuary estate, as it is, shall go to the tenant for life. The trustee wants to know this: "How often am I to have an examination of the books, and who, as between the tenant for life and the remaindermen, is to pay for it?" Now, it is obvious that without an examination of the books it will be impossible for the trustee to know whether any of the events mentioned in the agreement have happened or not. For instance, how can he ascertain, without an examination, whether either of the partners has drawn out money, or whether the balance-sheets are accurate? He has no means of testing such questions except by an examination of the books, and therefore an examination of the books must be required at some time or other. The provision is that the testator is to have an examination of the books and stock whenever he likes: the books are always to be open to him; and I do not see how you can lay down any hard and fast rule and say, "You shall examine the books once, and only once, a year." Why should the trustee be so fettered? It might be necessary to examine the books more frequently. For instance, he may in one year have examined the books, but subsequently he may have a suspicion that one of these events has happened since the examination of the books in that year, and may wish to examine them again, and it may be necessary, in order to ensure the security of the 15,000*l.*, that there should be a further examination of the books in that year. On the other hand, the continuing partners may carry on the business so well that the trustee will have no suspicion of any of the events having happened, and so will not desire to examine the books again in any one year; also, the partners may reduce the amount of the principal sum so that very little of it may be

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left in the business, and an annual examination of the books may not be necessary at all. Accordingly, I am of opinion that the trustee ought not to be told that he is to have an examination every year whatever happens, and that he is to have it only once a year. In my opinion, his discretion ought not to be fettered in that way. Therefore the direction to the trustee should be in the form Lindley L.J. has suggested.

Then comes the question out of what should the expense of the examination come—out of capital, or out of income? In the first place, the object of the provisions in the agreement is to ensure repayment of the capital. If the trustee finds that a breach has been committed of any of these provisions, then his duty will be to call in the capital sum at once, and he cannot tell whether or not there has been a breach without an examination of the books. Surely that is a provision which the testator deliberately introduced into this agreement for the purpose of making himself safe as to the repayment of this capital which he had not charged in terms upon the capital of the business. The expense is one in which the persons entitled to the capital ought to share: why then should it all be thrown upon the tenant for life? The debt may be outstanding until the year 1904: the tenant for life may outlive that period, and all may have been paid off by that time, and the remaindermen would not have had to pay one penny of the expense, although it was incurred to ensure the repayment of the capital sum. In my opinion the learned Vice-Chancellor was not justified in throwing this expense on the tenant for life alone.

Mr. Thompson ingeniously likened the case to one of insurance. The analogy is not good, for one reason, because, in the case of insurance, the premium bears a very small proportion indeed to the value of the property insured, and the premium on 15,000*l.* would not be anything like 213*l.* a year, which is the estimated expense of each examination of the books. It appears to me that the analogy is, for that and other reasons, not a good one. On the other hand, if the trustee has no power to insure given by the will, he cannot do so unless the recent Act, the Trustee Act, 1893, gives him the power. Mr. Cozens-Hardy's reply touches the very point of the case. These

are expenses incurred and to be incurred by the trustee in the administration of the estate. The expenses are primâ facie capital charges. The charge would of course reduce the capital of the estate to that extent, and the tenant for life would lose the income of the capital applied in payment of the charge; but the trustee, as between her and the persons entitled in remainder, should pay the expense out of capital, and this seems a fair way of dealing with the case. I therefore differ with respect from the learned Vice-Chancellor, and think that the expenses of these audits, whenever held, ought to come out of capital and not out of income.

A. L. SMITH L.J. The question is whether the expense of these audits for the purpose of seeing whether the 15,000*l.* capital is safe or not should come out of capital or income. Mr. Thompson says they come under the head of usual outgoings, while Mr. Cozens-Hardy says they should be classed as "costs, charges and expenses." In my opinion they come under the latter class. It is said that the case is like one of insurance, where the tenant for life pays the premiums; but the difference between the two cases is this, that in the case of insurance the payment is a voluntary one made by the tenant for life out of his own income without any obligation on his part to do so at all. Here the payment is one which the trustee, for the benefit of the tenant for life as well as of the remaindermen, may properly incur in order to see whether the 15,000*l.*, of which the tenant for life receives the present income, and the persons entitled in remainder take the ultimate benefit, is safe or not. It is quite clear, in my judgment, that the expenses of these audits are costs, charges and expenses incurred for the benefit of the whole estate, and therefore ought to come out of capital and not out of income.

Solicitors: *Field, Roscoe & Co., for Miller, Peel, Hughes & Rutherford, Liverpool*; *J. F. Harrison & Burton, Liverpool.*

G. I. F. C.

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[1896 L. 387.]

Company—Directors—Notice of Meeting of Directors—Notice of Business to be Transacted—Authority to use Name of Company.

Directors of a company, being the select managing body, can at any meeting of the board deal with all affairs of the company then requiring attention, whether ordinary or not, and previous notice of the special business is not a necessary condition of the proceedings being valid.

S., T., and W. were the directors of a newly-formed company, no shares in which had been allotted, two directors being a quorum. T. and W., without notice to S., held a meeting on February 14, at which they appointed X. a director, appointed solicitors and bankers, and accepted an offer for the use of offices. On the 22nd, S., who had heard of these resolutions, obtained a memorandum, signed by five of the seven signatories to the memorandum of association, authorizing him to use the name of the company in an action to prevent the directors from carrying out the resolutions of the 14th, and on the same day he issued a writ against T. and W., in which he and the company were co-plaintiffs. On the same day, before the writ had been served, S. received a notice that a board meeting would be held on the 24th, not stating the nature of the business to be done, and a letter from W. stating that the business done on the 14th would be brought up again. On the 24th S. did not attend, and T. and W. appointed X. and Y. directors, and allotted to each of themselves the number of shares which was the qualification of a director, and affirmed the resolutions of the 14th. The writ was then amended by adding X. and Y. as defendants, and asking a declaration that the resolutions of the 24th were void, and an injunction to restrain the defendants from acting upon them, and to restrain X. and Y. from acting as directors. The company, pursuant to a resolution passed on the 24th, moved, by the solicitors appointed by the above resolutions, to have the name of the company struck out as used without authority:—

Held, reversing the decision of North J., that the resolutions of February 24 were valid, and X. and Y. duly elected directors:

Held, further, that S. had used the name of the company without authority; that, as the resolutions of February 24 were valid, the motion to strike the name out was authorized; and that it must be struck out with costs to be paid by S.

THIS company was registered as a company limited by shares on May 30, 1895, with a capital of 400,000*l.* in 1*l.* shares. Its objects, as defined by the memorandum of association, were to acquire and to develop an estate known as "Le Touquet," on

the coast of France; to develop it as a building estate, and to carry on as incident thereto any of a long list of businesses.

By the articles it was provided that no business should be transacted at any general meeting except the declaration of a dividend unless a quorum of members was present, which quorum was to consist of not less than twenty members, or else of ten members holding not less than 10,000 shares. In case of a poll each member was to have a vote for every share held by him.

"Art. 92. The number of the directors shall not be less than three or more than nine. Art. 93. The first directors of the company shall be appointed by the subscribers of the memorandum of association. Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors. Art. 94. The first directors shall have power to appoint any other persons to be directors at any time before the ordinary general meeting to be held in the year 1896, but so that the total number of directors shall not at any time exceed the maximum hereinbefore prescribed." The qualification of a director was the holding 500 shares. It was provided that he might act before acquiring his qualification, but should acquire it within three months of his appointment; and if he had not otherwise acquired it within that time he should be deemed to have applied for and agreed to accept an allotment of the number of shares necessary to make up his qualification. The remuneration of each director was to be 200*l.* per annum. By art. 107 it was provided that "any casual vacancy occurring in the board of directors may be filled up by the directors," the person so chosen to retain his office only so long as the vacating director would have retained the same if no vacancy had occurred. The directors had power to regulate their meetings and determine the quorum necessary for the transaction of business; but until otherwise determined two directors were to be a quorum.

The memorandum was subscribed by seven persons for one share each. These seven persons, on June 18, 1895, appointed seven persons to be first directors—Berardi, Burnand, Chigot, Lechat, Seal, Tellier, and Whitley. Chigot and Lechat refused

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to accept office. Berardi either refused to accept or resigned shortly afterwards. Whitley did not accept, and stated that he did not know of his appointment till long afterwards. Burnand accepted, but resigned on July 12, 1895; so that there remained only Seal and Tellier, the latter of whom was resident in France. On February 3, 1896, Seal and Tellier appointed Whitley to be a director, and he thenceforth acted.

On July 27, 1895, the applications for shares not having been numerous, it was resolved at a meeting of directors to postpone the allotment of shares and to return the deposits which had been received from applicants.

On February 14, 1896, Whitley and Tellier held a board meeting in Whitley's room at the Constitutional Club. Seal received no notice of this meeting. Resolutions were passed at it to the following effect: (1.) That Sir Terence O'Brien should be appointed a director. (2.) That Messrs. Lee & Pembertons should be appointed the company's solicitors. (3.) That Messrs. Charles Hopkinson & Sons should be appointed bankers to the company for 30,000*l.*, which it was proposed to raise by mortgage of the property to be acquired at Le Touquet, and Messrs. Coutts & Co. for any part of the share capital which might be banked in London. (4.) That the offer of the International Sleeping Car Company for the use of its offices in Paris and London at 50*l.* per annum each should be accepted.

Up to this time no shares had been allotted.

Seal, on being informed of these resolutions, obtained a memorandum, signed by five of the signatories to the memorandum of association, authorizing him to use the name of the company in an action to restrain Whitley and Tellier from acting on the above resolutions; and on February 22, 1896, he issued a writ of summons in the names of the company and himself as co-plaintiffs against Whitley and Tellier, claiming a declaration that the resolutions of February 14 were void, that a change of the company's registered address which had been made was invalid, and an injunction to restrain the defendants from keeping the books of the company elsewhere than at the old registered address, "and from excluding the plaintiff S. S. Seal or preventing him from acting as a director of the plaintiff

company, and from acting upon or carrying into effect the said alleged resolutions."

On the same February 22, before this writ had been served, Whitley wrote to Seal: "I have requested the secretary, Mr. Martin, to convene a meeting of the directors for Monday or Tuesday next, at which the business will be brought up which was the subject of the meeting held on the 14th instant. I give you this early information, but you will receive a formal notice in due course from Mr. Martin." On the same day Seal received a notice signed by the secretary: "A meeting of the board of directors of this company is convened for Monday, the 24th, at 11 A.M., at 14, Cockspur Street." Seal appeared not to have had any notice of this meeting when he obtained signatures to the memorandum authorizing him to use the name of the company.

On Monday, the 24th, a meeting of directors was held, at which Whitley and Tellier were present, but Seal was not. A letter from Seal to the secretary referring to one from Seal to Whitley, suggesting that, pending the application which was about to be made to the Court, the meeting had better stand over, was read. The meeting, however, proceeded to business, and allotted to Whitley and Tellier 500 shares each as their qualification to be directors, and passed resolutions: "That the proceedings of the meeting of directors held on February 14 be and the same are hereby adopted and confirmed by the board of directors, and that the steps taken by the board and by the secretary consequent upon such resolutions be and the same are hereby adopted and confirmed by the board." That the action of the secretary in registering on February 12 the change of the registered office should be adopted; that Sir Terence O'Brien and General Taylor should be elected directors; that Messrs. Lee & Pembertons should be appointed the company's solicitors in England, and that Messrs. Hopkinson & Sons should be appointed bankers to the company; that the resignation of Mr. Martin as secretary should be accepted; that Mr. Colliver should be appointed secretary; that the offer of the International Sleeping Car Company for the use of its offices in Paris and London at 50*l.* per annum each should be accepted;

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that 11, Cockspur Street, should be the registered office, and that the secretary should give the requisite notices; "That Messrs. Lee & Pembertons, as solicitors to the company, be and are hereby instructed to take all necessary steps to prevent the name of 'La C^ie^ de Mayville, Limited,' being made use of by Mr. S. S. Seal in his action against Mr. Whitley and M. Tellier, and any other steps they may deem necessary for the protection of the company's interests." The secretary was directed to notify to the Post Office the company's change of address.

On March 3, pursuant to an order of February 27, the writ was amended by adding Sir T. O'Brien and General Taylor as defendants, and asking a declaration that the resolutions of February 24 were void, and claiming an injunction to restrain Sir T. O'Brien and General Taylor from acting as directors.

Notice of motion for injunction was served with the writ, and notice of motion was also given on behalf of the company that the name of the company might be struck out of the action as plaintiffs, and that all proceedings in the action, so far as they were concerned, might be stayed, on the ground that their name had been used without authority. The notice also asked that Seal and Messrs. Oldman, Clabburn & Co., the solicitors through whom he had acted, might be ordered to pay to the company their costs of the action and of the present application, to be taxed as between solicitor and client.

Before the motions were heard another board meeting of March 2 was held, at which Seal, Whitley, Sir T. O'Brien, and General Taylor were present, and at which a considerable allotment of shares was made.

The motions came on before North J., and were disposed of on March 10. His Lordship was of opinion that the notice calling a meeting of directors must state the nature of the business to be brought forward if it is of an important or extraordinary character; that the appointment of new directors and the allotment of shares under circumstances like those of the present case were matters which ought to have been mentioned in the notice calling the meeting of February 24; that the resolutions passed at that meeting were, therefore, irregular, and the defendants must be restrained from acting on the reso-

lutions of the 14th and 24th; that Sir T. O'Brien and General Taylor were not duly appointed directors, and that they must be restrained from acting as such. His Lordship did not grant any injunction for excluding Seal from acting as a director, on the ground that the evidence did not shew any intention to exclude him, but he restrained the defendants from holding meetings without giving him notice. As to the motion to strike out the name of the company, his Lordship thought that Seal had no authority to use it, but that no valid authority had been given to make this motion in the name of the company. The motion was therefore refused.

The defendants and the company severally appealed.

Vernon Smith, Q.C., and *Gore-Browne*, for the defendants, in support of their appeal. The important question in this case is whether the notice summoning a meeting of directors of a joint stock company must of necessity state the nature of the business to be considered at it. We say there is no rule that it must, and such a rule would be very embarrassing in carrying on the business of companies. Lord Tenterden in *Rex* v. *Pulsford* (1) lays down the principle that where there is a select body of persons whose duty it is to attend a meeting and consider all the business that may be brought before them, it is not necessary that the notice convening them should state what the business is to be, and his Lordship distinguishes the case from that of a meeting of a general body of corporators who are under no obligation to attend. In the case of *In re Homer District Consolidated Gold Mines* (2), which was relied on against us, it is true that some stress is laid in the judgment on the notice being so worded as not to give information as to the business to be done; but that was only one element among many, the meeting being altogether of the most irregular description. The notice was the shortest that had ever been given, being sent out at 11 A.M. for a meeting at 2 P.M. One of the two directors summoned sent word that he could not attend till 3 P.M., and the other did not receive his notice till the next day; and, under these circumstances, a bare quorum

(1) 8 B. & C. 350.

(2) 39 Ch. D. 546.

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of two proceeded at 2 P.M. to annul the resolutions passed by a full board of five. That case falls far short of what the plaintiffs want. Then the plaintiffs relied on *In re London and Southern Counties Freehold Land Co.* (1) ; but that was a meeting of subscribers of the memorandum of association to elect directors, and the same principles do not apply to a general body of subscribers as to a body of directors whose duty it is to attend. We say, then, that the directors were not precluded from considering any of the points mentioned in the resolutions of February 24. Seal ought to have protested at the time against holding the meeting, and required it to be postponed, and, not having done so, he is too late to object now that the notice did not state the nature of the business : *Browne* v. *La Trinidad.* (2) In this company the directors were paid by salary, which made it the more their duty to attend, and whatever business came before them they could deal with. It would throw a great difficulty in the way of directors if, when a matter not mentioned in the notice was brought before them, they had to consider whether it was so important or extraordinary that it ought to have been mentioned in the notice, and, if so, whether it was sufficiently urgent to justify them in proceeding with it though it had not been mentioned. The ground for the injunction fails. *Wills* v. *Murray* (3) is a distinct authority that in the absence of any special provisions in the constitution of the company a board of directors may consider matters not referred to in the notice convening them.

Younger, for the company, in support of their appeal. I ask for an order like that in *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong.* (4) Seal had no authority to use the name of the company. The memorandum signed by five signatories of the memorandum of association did not confer it, for the concurrence of all was requisite, as no meeting of them was convened : *In re Great Northern Salt and Chemical Works* (5) ; *John Morley Building Co.* v. *Barras.* (6) Moreover, that memorandum only purports to give authority as regards the meeting of the 14th,

(1) 31 Ch. D. 223.
(2) 37 Ch. D. 1.
(3) 4 Ex. 843.
(4) 13 Ch. D. 310.
(5) 44 Ch. D. 472.
(6) [1891] 2 Ch. 386.

and a proceeding to impeach the meeting of the 24th is outside it. So far North J. was in my favour. But I submit he was in error in holding that the motion to remove the company's name was not duly authorized. When the notices for the meeting of the 24th were sent out it was not known that Seal had begun his action; and even if, as North J. held, it is necessary to state in the notice any important business, this comes within the exception on the ground of its being an important matter which could not have been mentioned in the notice. Moreover, Seal ought to have protested before: *Browne* v. *La Trinidad.* (1)

Swinfen Eady, Q.C., and *Peterson*, for the plaintiffs. Whitley was not a first director, never having accepted his appointment by the subscribers. He accepted the appointment of February 3, 1896, and cannot be heard to say that he comes in under the former. He, then, not being a first director, had no power under art. 94 to appoint further directors. It is said that if Seal objected to the proceedings he had only to call a general meeting. That might be so if a meeting could be called of the company as it stood before these irregular proceedings; but in the meantime Whitley and Tellier had allotted shares to their own nominees, and it is not allowable for directors to allot shares for the purpose of influencing an approaching meeting: *Fraser* v. *Whalley.* (2) The notice convening the meeting of February 24 gave no information of any intention to allot shares, in fact, by implication it stated that only the business before the meeting of the 14th would be brought forward. Seal had a right of action on account of exclusion from the office of director: *Pulbrook* v. *Richmond Consolidated Mining Co.* (3) There had in fact been an exclusion, for the other two directors held a meeting without giving him notice, and never afterwards gave any explanation. He can, therefore, maintain the action even if the name of the company is struck out. But he was justified in using the name of the company. There is no rule that a resolution of a general meeting is necessary to authorize such user: *Pender* v. *Lushington.* (4) The test there given (5)

(1) 37 Ch. D. 1.
(2) 2 H. & M. 10.
(3) 9 Ch. D. 610.
(4) 6 Ch. D. 70.
(5) 6 Ch. D. 78.

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is whether the majority of the persons interested in the company wish the action to be brought. The sanction of five out of the seven subscribers, therefore, justifies it. The cases cited do not support the contention that the notice convening the meeting need not specify the business. *Wills* v. *Murray* (1) was a case of a notice of an adjourned meeting. *Rex* v. *Pulsford* (2) is confined to municipal corporations, and only applies to a meeting convened by the chief officer, whom it is the duty of the persons summoned to assist. *In re Homer District Consolidated Gold Mines* (3) decides that a bare quorum summoned without notice of the business to be done cannot rescind the resolutions of a former meeting. The resolutions of February 22 are therefore invalid. Whitley was not a first director, and could not concur in appointing new directors under art. 94, and they could not be appointed under art. 107, for there were no casual vacancies, that term being only applicable to the case of directors who have accepted office and vacated it otherwise than by rotation.

Vernon Smith, Q.C., in reply. Chigot resigned after accepting—that is clearly a casual vacancy. As to Berardi, Seal's first affidavit says he resigned, and, if so, there is another casual vacancy, even on the respondent's contention. But the true view is that "casual vacancy" includes every vacancy not occasioned by retirement in rotation.

Younger, in reply.

[LINDLEY L.J. Have you any case where, when there are two plaintiffs, one of whom has authorized the proceedings, an order has been made on the solicitor to pay the costs of the other whose name has been used without authority?]

I cannot refer to any such case, and I submit the mode of dealing with the costs to the Court. The document signed by the subscribers to the memorandum was not a sufficient authority. In *Pender* v. *Lushington* (4) there had been a majority at a meeting duly convened.

LINDLEY L.J. This case involves one question which is of great importance to companies. The rest of the points are

(1) 4 Ex. 843.
(2) 8 B. & C. 350.
(3) 39 Ch. D. 546.
(4) 6 Ch. D. 70.

comparatively trifling. The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do it; but it strikes me, as it struck Lord Tenterden in *Rex* v. *Pulsford* (1), that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation. It is not uncommon for directors conducting a company's business to meet on stated days without any previous notice being given either of the day or of what they are going to do. Being paid for their services—as they generally are, and as is the case in this company—it is their duty to go when there is any business to be done, and to attend to that business whatever it is; and I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies.

Lord Tenterden had the very point before him in regard to municipal corporations in *Rex* v. *Pulsford*. (1) I need not refer to the facts, but the point was taken there that a notice was not given of the business to be transacted at a meeting of the managing body. Lord Tenterden says (2): "In *Rex* v. *Hill* (3) the election was by the body at large, which is a very different thing." Then he goes on, a little lower down: "The present is the case of an election by a select body, and we are of opinion that it was not necessary in the notice to them to state the purpose of the meeting. But although we are of that opinion in this case, we avoid giving any opinion as to an election by a corporate body at large. The difference between them is this: the select body are appointed to be aiding and assisting the mayor on all occasions concerning the city, when required so to do. It is, therefore, their duty to attend whenever the mayor gives them reasonable notice that

(1) 8 B. & C. 350. (2) 8 B. & C. 354. (3) 4 B. & C. 426.

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their attendance is required; and we think they are not at liberty to say that they abstained from attending because they did not knew the specific purpose for which the meeting was about to be holden. If, indeed, it had appeared to be usual in this borough to give a more precise notice, the case would have been very different; but nothing of that kind is suggested." He decided, therefore, that the notice, though not stating the object of the meeting, was sufficient. The only other case, so far as I know, in which this point has ever been brought forward or considered, is the case of *In re Homer District Consolidated Gold Mines*. (1) The judgment of North J. in that case no doubt contains a passage which goes to shew that he thought it was at all events an important point that the purpose for which the directors' meeting there was called was not stated; but when the case is examined you find that, whatever may be said about the necessity for the giving of any such notice, the decision is absolutely right. The case was this: Some shares had been applied for, and at a board meeting it was resolved that no allotment should be made until at least 14,000 preference shares should have been applied for by approved applicants. Some time after this, some applications for shares having been made, two directors held a meeting with very short notice, the notices for a meeting at 2 P.M. not being posted till 11 A.M. on the same day—a meeting held very irregularly in many respects—at which they rescind that resolution and proceed to allot shares. The persons to whom those shares are allotted come and say, "It is a trick, and we require that allotment to be cancelled"; and it was cancelled accordingly. It was an attempt to capture shareholders—a trick which no judge could possibly countenance. In the course of dealing with that trick, North J. says (2), amongst other things, "What is more, it" (that is, the notice convening the meeting of the board) "was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give Witt and Simpson notice of what was to be done. On that notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not

(1) 39 Ch. D. 546. (2) 39 Ch. D. 550.

knowing whether the other could come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion that was about as irregular as anything could be." That the notice did not mention the business is only treated as one of the circumstances unfavourable to the validity of the resolutions, and we are asked to say now, for the first time as a matter of law, that a notice to the directors of a directors' meeting must state what the business is if it is anything more than routine business. If we did so, I think we should not be laying down sound law. Such a rule is not required for the honest transaction of business, and would be most disastrous.

It will be found, I think, that there is next to nothing else of importance in the case. This is an application in the name of this company and a Mr. Seal to restrain certain directors from doing two things. The order has not been drawn up, but we have the substance of it before us. It is asked that they be restrained from holding meetings of the directors of the company without giving notice to the plaintiff, Mr. Seal, and from acting on or in any way carrying into effect certain resolutions passed on February 14, 1896, and then by amendment of February 24, 1896; and that the defendants, Sir Terence O'Brien and Sir Richard Taylor, may be restrained till further order from acting as directors.

The facts are these. A company was formed, and was registered on May 30, 1895. The main object of the company was, as described in the memorandum of association, to purchase and develop a property in France under some agreement made between some French persons and Mr. Whitley, who had control of the company. The memorandum of association is signed in the usual way by seven persons having one 1*l.* share apiece, and we are told that four of them were either clerks or nominees procured by Mr. Seal, who was a solicitor. The nominal capital is 400,000*l.* The clauses in the articles which relate to directors are important. [His Lordship read arts. 92, 93, and 94.] Pausing there for a moment, I understand that to mean that the subscribers to the memorandum of association are to nominate the first directors; then the persons

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so nominated shall have power to appoint any additional persons as directors, provided, of course, that the maximum of nine is not exceeded, and it works out in this way: if the subscribers to the memorandum of association nominate enough persons, who accept office, to form a quorum, then the subscribers to the memorandum of association have nothing more to do with it; if they nominate persons, of whom not enough to form a quorum accept office, they have not got a quorum and must nominate others, as there is nobody else to do it; but as soon as they have nominated persons, of whom enough to form a working board accept office, then the subscribers have ceased to have any more power as to that matter. Then art. 94 says that the persons so nominated (called in that article the first directors) may appoint other persons and increase the number. I do not understand that under art. 94 it is the first directors who are to appoint persons in the place of those who do not accept. If a person nominated does not accept, it is a casual vacancy, and that is covered by art. 107, which says that a casual vacancy occurring in the board may be filled up by the directors. If the subscribers to the memorandum of association nominate, as they did here, seven people, some of whom do not accept office, but others of them do accept office in number sufficient to form a quorum, the board so constituted can increase the number of the directors.

Now, what took place was this. The subscribers to the memorandum nominated seven directors. Two of them declined the office; one appears to have accepted, but to have speedily retired; three of them acted, and the last, Mr. Whitley, does not seem to have done anything. He did not act, but he never refused. So they go on. There was a board, consisting of Mr. Seal, Mr. Burnand, and Mr. Tellier, and there were no other directors. On July 12, 1895, Mr. Burnand resigned, leaving Mr. Seal and Mr. Tellier the only directors. On July 27 some applications having been sent in for shares, but only to the amount of some 1500*l.* or 2000*l.*, a resolution was passed at the board by Mr. Seal and Mr. Tellier that the allotment of shares should be postponed. It was not in any way a resolution not to accept, but simply to defer the allot-

ment. On February 3, 1896, Mr. Seal and Mr. Tellier appointed Mr. Whitley a director in the place of Mr. Burnand. He accepted the office, and there was then an acting board of three—namely, Mr. Seal, Mr. Tellier, and Mr. Whitley, and nobody quarrels with Mr. Whitley's appointment. A question has been raised as to whether, having been first nominated by the shareholders, and then appointed in this way, he is or is not a first director within art. 94; but, putting upon these articles the construction which I do, it appears to me that we need not trouble ourselves about that. We are now coming to matters to which Mr. Seal objects. On February 12 the office of the company, which had been temporarily at Mr. Seal's offices, was changed to Cockspur Street, and the change was registered under the Companies Act of 1862. On February 14 there was a meeting, which was called the bedroom meeting. The directors—Mr. Whitley and Mr. Tellier, who was in England only for a short time—held a meeting at Mr. Whitley's room at the Constitutional Club—a most informal and irregular meeting. On that occasion these two took upon themselves to appoint bankers and solicitors to the company; they also appointed Sir Terence O'Brien a director, and accepted certain offers as to offices which were going to be taken. That was utterly irregular, no notice of the meeting having been given to Mr. Seal. He was, however, informed of it—no matter how—on the 20th. On the 22nd notice was sent by the secretary to Mr. Seal, convening a board meeting for the 24th, not stating its object; and Mr. Seal, on the 22nd, not later than 1.30 P.M., knew by a letter from Mr. Whitley that a meeting was going to be called for doing over again what was irregularly and improperly done on the 14th. It is true that the letter only told him that the business dealt with on the 14th would be brought up, and did not tell him what else would be done. On the same 22nd Mr. Seal gets this authority from five of the seven gentlemen who signed the memorandum of association: "We, the undersigned members of the company, do approve of the use of the company's name in the action brought by Mr. Seal, one of the directors, for declaring the resolutions purporting to have been passed by Mr. Whitley and Mr. Tellier on the 14th

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to be void, and rectifying what was professedly done pursuant to such resolutions." On the same day he issued the writ in this action, and we are told that it was actually issued, although not served, before Mr. Seal knew of this coming meeting on the 24th. The writ and the notice of motion are to the effect that the resolutions on February 14 might not be carried into effect.

Mr. Seal did not attend the meeting of February 24, 1896, but he wrote a letter saying that, pending these proceedings, it had better stand over. He did not choose to go. A meeting was held by two of the directors, at which Sir Richard Taylor and Sir Terence O'Brien were appointed directors. Five hundred shares each were allotted to Whitley and Tellier, being the director's qualification. After that the writ was amended on February 27, 1896; Sir Terence O'Brien and Sir Richard Taylor were added to the defendants; and the injunction, which had been confined to the meeting of the 14th, was asked for in these terms: "That the directors be restrained from acting upon or in any way carrying into effect certain resolutions passed on the 14th February, 1896, and the 24th of February, 1896, and that the defendants O'Brien and Taylor may be restrained from acting as directors of the plaintiff company."

When this case came before North J. he did not grant any injunction against removing the books from the old registered office, nor did he grant any injunction to prevent the defendants from excluding Mr. Seal from the meetings of the directors, the learned judge being satisfied upon the evidence that there was not the slightest intention to exclude him. But he did grant an injunction to restrain the defendants from holding meetings of directors without giving notice to Mr. Seal, and from acting on or in any way carrying into effect the resolutions passed on February 14, 1896, and on February 24, 1896. He did so on the ground that, as a matter of law, the resolutions passed at the meeting of February 24, 1896, were invalid on the ground that no notice was given to Mr. Seal of the business which it was proposed to transact at that meeting. I think this view erroneous in point of law.

That being the case, the whole foundation for the injunction goes.

The appeal of the directors against this injunction must therefore be allowed on the ground that the appointment of Sir Richard Taylor and Sir Terence O'Brien was valid, and that there is nothing in point of law which invalidates the resolutions of February 24, 1896.

Now as regards Mr. Younger's motion to strike out the name of the company which has been used by Mr. Seal under the authority to which I have referred, that motion must succeed. Mr. Seal had no authority whatever to use the name of the company in these proceedings. If what was done on February 24, 1896, is valid, the appointment of the solicitor was valid, and Mr. Seal could not possibly have any authority at all. But he says, "I brought this action and served this writ before that meeting, when all I knew was the irregular proceedings of February 14." But what authority has he even in that case? He has not got the authority of any meeting of the shareholders. He has got the authority of five out of the seven subscribers, it is true—got by him, I suppose, by sending round and asking them for their sanction. But that authority seems to me not worth the paper it is written upon. If authority is wanted to use the name of the company it must be authority got from the proper quarter—either from the directors, or from the shareholders convened for the purpose. This is neither one nor the other. Then Mr. Seal says that still the Court ought to see from the authority which he obtained that he would have had the authority of a majority of the shareholders. But before the writ was served Mr. Seal knew that the business transacted at the meeting of February 14 was to be submitted to a meeting regularly summoned. There was therefore no reason for impeaching the resolutions of the 14th, and Mr. Seal cannot support his contention that he had the authority of the company to institute these proceedings. It follows that the name of the company ought to be struck out, and the costs as between solicitor and client ought to be paid by Mr. Seal, who has improperly used that name. Mr. Younger has put his view that the solicitors also ought to be made liable to pay those costs; but no case has been made for such an order. There are no doubt cases, and Mr. Younger has

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called attention to one, in which the solicitor putting the name of a company on a writ without authority had to pay costs; but it is to be borne in mind that here the solicitor is acting for Mr. Seal as well as for the company. It appears to me that this is a litigation that ought never to have been brought, and for which there is not the slightest ground or justification, and that Mr. Seal and not his solicitors must take the consequences.

KAY L.J. In this case two questions have been argued which are of considerable importance.

The first question is, Can the directors of a joint stock trading company pass resolutions at their meetings as to matters not mentioned in the notice summoning the meeting or in an agenda paper accompanying the notice, and saying what matters are to be discussed at that meeting? As I understand the learned judge's judgment, he does not hold that notice to summon a directors' meeting must shew, or be accompanied by an agenda paper shewing, all business to be done at the meeting. But he says, if I have read the judgment rightly, that where the business is of an extraordinary or unusual character, then notice must be given of it, or else any resolution passed at the meeting with reference to it will be invalid.

It is seen at once in what an enormous difficulty that would place directors. Who is to decide what is such extraordinary business that notice of it ought to be given? The learned judge feels that difficulty, because in the shorthand note of the judgment he is reported to have said: "Then it was said, 'Where are you to draw the line between what is important business of which notice should be given, and what is not important business of which notice need not be given?' I have no intention of drawing any such line: it would be impossible to do so, and it would also be very inexpedient to attempt to do it—nay, more, you may have matters going to be done with one company which may be very important business indeed, but with another company the transaction may be such as not to be a specially important matter for the company, and it might be a matter of common occurrence. Therefore, I do not intend to draw any line except to say, and I do say, that, wherever you

draw the line, the appointment of directors and the allotment of shares under such circumstances as the present are cases that come on the side of the line on which matters will be found with respect to which notice should be given. In my opinion, therefore, it was essential for the validity of the resolutions passed at the meeting that Mr. Seal, an absent director, should have had notice that it was the intention to associate with him and the other two, two new directors, and also that he should have had notice of the intention to proceed to allotment of shares of the company." If I understand rightly the meaning of the language of the learned judge, it is that it is not necessary in every case to give notice of the business to be done at a directors' meeting, but that such business as was transacted at the meeting of February 24 could not be validly transacted unless notice of such business was given in or with the notice calling the meeting. I have never before heard that laid down. As a matter of law I think there is a great difference between a meeting of the directors of a joint stock company and a meeting of the shareholders. I am not going to say a word as to what is proper notice to be given in the case of a meeting of the shareholders. This is a meeting of directors who have to transact the ordinary business of the company, and I do not see how, as a matter of business, such a rule as is contended for would be a workable rule. It would put directors, as I have said, in very great difficulty, and the only safe course would be to send to every director, along with the notice of the meeting, an agenda paper of all the business to be done at it, in order that they might be sure of not omitting some business which, in the opinion of a judge before whom the matter might come, was such that notice of it ought to have been given. We know very well that that is not the ordinary course. In many cases, as Lindley L.J. has pointed out, meetings of directors are held at stated periods, on a particular day in every week or every month as the case may be, and no notice whatever is given of those meetings. It is very often the case that where some extraordinary business is going to be done notice is sent of a meeting of the directors, and that such and such a business will be transacted. That is a very useful, proper, and wise

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thing to do; but to say that it is absolutely imperative, and that without such a notice the business cannot be transacted, is, I think, not according to law, and would establish a most inconvenient rule, and one which would hamper in an unprecedented way the business of directors of joint stock companies. I will not refer again to *Rex* v. *Pulsford* (1), referred to by Lindley L.J., further than to say that it seems to me to be completely against the view that there is any such rule of law. In the articles of association there is an article which says that when any special business is to be transacted at a meeting of shareholders notice of that special business shall be given. But there is nothing of the kind with respect to a meeting of the directors, and there is no article that says anything about notice being given to convene meetings of directors.

There is another fact in this case which seems to me to be material with reference to this question. The directors in this company are to be paid by a yearly salary, and unless they omit to attend for a considerable time they will receive that salary whether they are at the meetings or not. In many cases the directors are paid (and it seems to me a very much better way) only for the meetings at which they attend; but in this case, where they are paid by a regular annual salary, no honest man would draw the salary and keep away from the meeting if he could attend; so that in this case there is special reason why a director should be present at a directors' meeting, whether he knows what is the particular business to be transacted at that particular meeting or not. I therefore think that on that point—and it is a very important point—we must decide that in point of law, even when extraordinary business is to be transacted at a directors' meeting, it is not necessary to give notice beforehand of the intention to transact that extraordinary business.

The other important question in this case is whether Mr. Seal had a right to use the name of the company and to bring this action? [His Lordship read the writ.] In the whole of that writ there is in my opinion only one thing in respect of which Mr. Seal would be justified in bringing an action against

(1) 8 B. & C. 350.

the company, and that is to prevent himself being excluded from acting as director—all the rest of the relief claimed seems to me to be an interference with the internal management of the company, and this Court does not allow members of a company or directors of a company to involve the company in litigation about its internal management. Everything in the writ except the alleged exclusion of Mr. Seal is a matter which the company could condone or set right. The proper course (as is pointed out in *Foss* v. *Harbottle* (1), and as has been held ever since), in the case of any matter which relates to the internal management and trade affairs of the company, is to call a meeting, and that is practically the only remedy which this Court allows a director or a shareholder of a company to take; otherwise we should have companies torn to pieces by litigation of this kind. The Court has always set itself resolutely against such litigation.

But then it was said that when this writ was issued Mr. Seal could not possibly call a meeting of the company, as there were only seven shareholders altogether, five of whom signed the authority under which he acted. But the writ which was served on February 22 was amended, and as amended it applies to what existed after the meeting of February 24. Now, at that meeting two 500*l.* qualifications were given to the directors, and the votes of this company were to be one vote per share; so if that was a good meeting there was no pretence for saying that Mr. Seal had a majority in his favour. Then it is said, "Yes, but a meeting of shareholders cannot be held unless there are twenty members present, and there were not twenty members of the company." That might be a reason possibly for instituting an action of this kind, if there were nothing more behind; but there is a great deal more behind. Before the writ in this action was served, Mr. Seal knew very well that the only ground for bringing this action was about to be removed in a regular and proper way. The objection was, when he first issued his writ, that what had been done at the meeting of February 14 was irregular, as he had no notice of the meeting. Undoubtedly it was entirely irregular, and if

(1) 2 Hare, 461.

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that had stood alone he might have said, "There is an obvious intention to exclude me because I had no notice of that meeting, and I ask the Court to infer that future meetings will be held in the same way, and that I shall be excluded designedly from taking my position as director, and therefore I invite them in respect of that personal wrong to set it right." That might be a very good reason for his bringing an action in his own name alone; but as I have said, he knew perfectly well on February 22 that another meeting was going to be held for the purpose of bringing up again the business transacted at the meeting of February 14, and of that meeting of the 24th he had not only the usual formal notice, but he received a letter written by Mr. Whitley to him. [His Lordship read the notice and Mr. Whitley's letter of February 22.] Mr. Seal admittedly knew on the 22nd what had been done at the meeting of the 14th, and there he gets a distinct notice that that business will be brought up again at the meeting of the 24th. His co-directors, in fact, admit that what had been done on February 14 was irregular, and say that they are going to put it right by holding a proper formal meeting on February 24. What then did he do? He applied on the same day for leave to serve notice of motion with the writ, and he wrote to the secretary and to Whitley suggesting that the meeting should be postponed. He did not attend the meeting. At that meeting formal resolutions were passed, doing all over again the business which had been irregularly done at the meeting of the 14th, and yet, although he knew that that was going to be done, he proceeded with his action, served the writ, and afterwards obtained the amendment of the writ in order to include what was done on February 24. I must say that there seems to me to be no kind of excuse for that. He knew perfectly well that there was no intention whatever to exclude him, and that was the only thing in respect of which he personally had any right to sue at all, and he knew that the company were going to act quite regularly and in a straightforward manner in respect of all the matters of which he was going to complain.

At the meeting of February 24 there were present two directors. That was a quorum. They transacted over again all the busi-

ness that had been done on February 14, and besides that they appointed two gentlemen directors, and they allotted to those two directors who had been previously appointed 500 shares each, which they were bound to accept by the terms of the articles of association. I think that the notice summoning this meeting was sufficient, and that what was done at it was perfectly regular. It was objected that the two directors present could not appoint two other directors. I am of opinion that they could. If they could not do it under the 94th article, they could, in my opinion, clearly do it under the 107th article, which applies to any casual vacancy. The subscribers to the memorandum had appointed five directors. Of those five two had accepted and resigned, and another had not accepted. I am clearly of opinion that in every one of those cases, whether they accepted and resigned or did not accept, there was a casual vacancy—a vacancy owing to a casualty which was within the meaning of art. 107; and, if that was so, these directors, whether Mr. Whitley was a first director or not (I am inclined to think that he was), had under art. 107 the right to appoint the two directors whom they did appoint.

That disposes of the whole case, because if that meeting was valid and Sir Terence O'Brien and Sir Richard Taylor were properly appointed directors, what took place at the subsequent meetings was also valid; and if the meeting of March 2 was valid a number of allotments were made to individuals of the general public who had applied for shares, and now there will be no difficulty at all in making a quorum to call a meeting of the company if required. In my opinion this action is entirely wrong, and no one should know better than a solicitor in Mr. Seal's position that an action of this kind ought not under the circumstances of this case to have been brought. I quite agree that the name of the company ought to be struck out, and I think the costs as between solicitor and client should be paid by Mr. Seal, and that the rest of the order should be discharged, and should be discharged, I think, with costs.

A. L. SMITH L.J., after reviewing the facts of the case, proceeded as follows:—As regards the first point, namely, that

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notice was not given of the objects for which the meeting of February 24 was called, I agree with what has fallen from Lindley L.J.; and I think with him that Lord Tenterden's decision in *Rex* v. *Pulsford* (1) covers this case. This was a selected board of directors, and without notice of what business was to be done it was their duty to attend the meetings of directors. I say nothing about meetings of shareholders; but a director is bound to go to a meeting of directors if he had notice when the meeting is to take place, whether he knows what business is to be transacted or not; and therefore it is not good law to say that everything which was done by two properly appointed directors who formed a quorum was invalid because the other had not notice of what they were going to do. That point, therefore, fails Mr. Seal.

Then he says, "But you could not appoint Sir Terence O'Brien and General Taylor under the articles of association. You could not do it under art. 94 because Mr. Whitley was not a 'first director,' and you could not do it under art. 107 because there was no casual vacancy." I think the true view is that there were casual vacancies to be filled up, for I think Mr. Vernon Smith was right in his contention that art. 107 was intended to include and did include under "casual vacancies" all vacancies except those arising from retirement by rotation, which was dealt with in the prior articles. I think that point also fails Mr. Seal.

Then comes the question, What right had he to use the company's name? None at all, in my opinion. He says that he had a right to use it because of the document he got on February 22, 1896, from five of the subscribers to the memorandum of association. But that is not an authority from the shareholders; and Mr. Younger has pointed out with considerable force that, even if it were so, that is only an authorization by those five gentlemen to deal with what had taken place in the bedroom meeting.

For these reasons I think Mr. Seal is hopelessly in the wrong, and I think he should be mulcted in costs. The appeal of the defendants will be allowed with costs here and below, and the

(1) 8 B. & C. 350.

name of the company will be struck out, with costs as between solicitor and client to be paid by Mr. Seal.

Solicitors: *Burn & Berridge*; *Lee & Pembertons*; *Oldman, Clabburn & Co.*

H. C. J.

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LA COMPAGNIE DE MAYVILLE *v.* WHITLEY.

J. LYONS & SONS *v.* WILKINS.

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[1896 L. 153.]

NORTH J. *Feb.* 13, 14, 20.

C. A. *March* 18, 19.

Trade Union—Strike—Picketing—Inducing Persons not to Contract with Plaintiffs—Intent to Injure—Malice—"Watching or Besetting"—Interlocutory Injunction—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31)—*Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.

The picketing of the works or place of business of an employer, for the purpose of persuading people, whether masters or men, not to work for him, is a "watching or besetting" with a view wrongfully and illegally to compel persons to abstain from doing a lawful act, within the meaning of s. 7, sub-s. 4, of the Conspiracy and Protection of Property Act, 1875.

The defendants, officers of a trade union, ordered a strike against the plaintiff manufacturers, and also against S., a person who made goods for the plaintiffs only; and their pickets by their direction watched and beset the works of the plaintiffs and of S., for the purpose of persuading work-people to abstain from working for the plaintiffs.

The Court of Appeal (affirming the decision of North J.) *held*, that this kind of picketing and the strike against S. for the indirect purpose of injuring the plaintiffs were illegal acts, and they granted an interlocutory injunction to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing S. or any other persons from working for the plaintiffs by withdrawing his or their workmen from their employment.

The Conspiracy and Protection of Property Act, 1875, discussed and explained.

THE plaintiffs were J. Lyons & Sons, leather bag and portmanteau manufacturers, of Redcross Street, London, E.C. The defendants were P. C. Wilkins, the secretary, and Charles Clarke, a member of the executive committee of a trade union called the Amalgamated Trade Society of Fancy Leather Workers. The plaintiffs claimed an injunction to restrain the defendants from unlawfully and maliciously procuring or conspiring to procure persons to break contracts with the plaintiffs,

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and from unlawfully and maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs, to restrain libel, and damages. The action was brought on upon motion for an interlocutory injunction on the part of the plaintiffs in terms of the claim.

In December, 1895, and early in January, 1896, communications by letter and by interview took place between the defendants, acting on behalf of the executive committee of their society, and the plaintiffs, with the object, on the part of the executive committee, of inducing the plaintiffs to raise the wages of their workpeople, and alter their system of employment from part piece-work and part time-work to a system of all piece-work or all time-work. The result was that the executive committee ordered a strike of the plaintiffs' works, and several of the plaintiffs' workmen gave notice to terminate their engagements and ceased to work, and the plaintiffs' works were picketed by persons employed by the executive committee. The pickets were furnished with cards. These cards were each headed, "Amalgamated Trade Society of Fancy Leather Workers, affiliated to London Trades Council, White Swan, Temple Street, E.C.," and printed on each of them were these words: "Dear Sir,—You are hereby requested to abstain from taking work from Messrs. J. Lyons & Sons, Redcross Street, E.C., pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers and machinists, &c., from applying for work until the dispute is settled."

The pickets accosted persons entering and leaving the plaintiffs' premises, tried to persuade them not to work for the plaintiffs, and gave them some of the cards; on one occasion they opened a bag carried by an errand-boy who was taking goods to the plaintiffs, and on one or two occasions followed persons into the plaintiffs' works. Among other letters written by the defendant Wilkins with a view to induce persons to leave the employ of the plaintiffs was one to the mother of a girl employed by the plaintiffs to get the mother's influence in urging the daughter to give up work, stating "the recollection of her assisting the employer against her fellow workers will remain for a long time."

The executive committee endeavoured to get one Schoenthal, who was a sub-manufacturer for the plaintiffs, to cease to do work for the plaintiffs, and on failing to do so they ordered a strike of and picketed his works.

Another sub-maker, called Scott, employed by the plaintiffs, was also threatened by the executive committee with a strike if he did not cease to do work for the plaintiffs. Some further details as to the facts will be found in the judgments of Lindley and Kay L.JJ.

The motion came on for hearing before North J. on February 13, 1896.

Levett, Q.C., and *Ward Coldridge*, for the plaintiffs. Interference with trade, of a character likely to do permanent injury to the trade, whether by libel or otherwise, will be restrained by interlocutory injunction: *Collard* v. *Marshall* (1); *Bonnard* v. *Perryman* (2); *Monson* v. *Tussauds*. (3)

In this case we submit that on the evidence the defendants have been guilty of libel, have in one case actually induced a workman to break his contract, and have induced and endeavoured to induce persons to desist from and not to enter into the employment of the plaintiffs. We admit that the defendants are at liberty to combine with others for their own benefit in a lawful way, and act in such way as to raise the workmen's wages, or otherwise improve their position, provided that they do so without malice: *Jenkinson* v. *Nield* (4); *Trollope* v. *London Building Trades Federation* (5); *Temperton* v. *Russell* (6); *Flood* v. *Jackson* (7); but the evidence shews that there is malice: threats have been used, and an innocent person has been struck against.

C. E. E. Jenkins (*Robson, Q.C.*, with him), for the defendants. If malice against the plaintiffs could be shewn it must be admitted that the acts of the defendants in respect of persuading the workpeople not to work for the plaintiffs or their sub-employer Schoenthal were illegal. But the defendants are

(1) [1892] 1 Ch. 571.
(2) [1891] 2 Ch. 269.
(3) [1894] 1 Q. B. 671.
(4) 8 Times L. R. 540.
(5) 72 L. T. (N.S.) 342.
(6) [1893] 1 Q. B. 715.
(7) [1895] 2 Q. B. 21.

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entitled to combine and persuade others to combine not to deal with the plaintiffs if they do so for their own benefit, however much they may injure the plaintiffs—that is to say, if they act without malice. The evidence shews that the whole object of the defendants is to benefit the workmen, and not to injure the masters further than is necessary to obtain the terms they require: *Mogul Steamship Co.* v. *McGregor Gow & Co.* (1); *Flood* v. *Jackson* (2); *Temperton* v. *Russell.* (3) As to libel, if there has been any publication of a libel, the libel has been harmless and unsubstantial; and it has not been suggested that any repetition will take place. The defendants have been careful, also, not to induce any one to break a contract, and if any was broken it was not broken through the instigation of the defendants.

Even if the Court is of opinion that there was some evidence of malice, the Court will not take on itself the decision of the issue of malice or no malice, and grant an interlocutory injunction, such issue being essentially one for a jury: *Flood* v. *Jackson.* (2)

Ward Coldridge, in reply.

Feb. 20. North J., after stating the facts and deciding that there was no case to justify interference with the defendants by interlocutory injunction either in respect of the inducing the breaking of contracts or libel, continued:—

Then the case in respect to maliciously inducing or conspiring to induce persons not to work for the plaintiffs requires to be rather more fully dealt with, for I understand maliciously inducing and conspiring to induce persons not to enter into contracts with the plaintiffs to mean and to cover not to do work for the plaintiffs, even if it is not on a contract. I read it to mean not to engage themselves with the plaintiffs to do work for them. As to that, the *Mogul Case* (1) shews clearly that the defendants might by lawful means, but not otherwise, endeavour to prevent persons working for another party; but I think it is quite sufficient for me in the present case to refer to two authorities shortly as shewing what the law is.

(1) [1892] A. C. 25. (2) [1895] 2 Q. B. 21. (3) [1893] 1 Q. B. 715.

The first is *Temperton* v. *Russell*. (1) Lord Esher referred to the action of the joint committee in that case endeavouring to prevent persons dealing with the plaintiffs. He says (2): "They intended thus to coerce the plaintiff to comply with their views, and they contemplated that, if he did not submit, his business would be destroyed." Again: "Though, of course, in point of law such other persons might be free to enter into contracts with the plaintiff, and would be bound to perform contracts made with him, as before, in point of fact the committee knew that the probable result would be that his business would come to an end, and they thought that the prospect of this would have a strongly coercive effect upon him." Lower down Lord Esher deals with the question whether it is unlawful to induce a person to break a contract. He says (3): "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." A little further on he says: "The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained, and whether the latter claim is maintainable in law." The latter claim is the one germane to the present matter: "I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered

(1) [1893] 1 Q. B. 715. (2) [1893] 1 Q. B. 725.
(3) [1893] 1 Q. B. 728.

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into, it is not actionable"; and after comments on the cases he expressed his opinion that there was no distinction between the two cases. Lopes L.J., on the second point, also says (1): "I will state shortly what I believe to be the law on the subject. The result of the authorities appears to me to be that a combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong if damage results to him therefrom:" and he then proceeded to refer to cases as leading him to that view upon the matter.

Again, in *Flood* v. *Jackson* (2) an attempt was made to punish persons for a past offence, and it was pressed on me that that case differed from the present in that respect. I think it does, and I have not forgotten that distinction; but the observations I am going to refer to are not touched by that remark. Lord Esher says (3): "It is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind the result is the same whether the persuasion is to break a contract or not to make a contract. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But if the first person uses that persuasion with intent to injure the other, or to injure the person with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful."

Now, Mr. Levett entirely accepted that statement of law, admitting that he must prove malice in order to succeed, and that if he could not prove malice he could not succeed.

(1) [1893] 1 Q. B. 731. (2) [1895] 2 Q. B. 21.
(3) [1895] 2 Q. B. 37.

In the present case it seems to me that there is strong evidence of malice before me. I will refer shortly to the affidavits on which I come to the conclusion that malice exists. [His Lordship considered the affidavits before him, referring to the matters stated above, and also a quarterly report of the executive committee circulated among the plaintiffs' workpeople, and a letter from a discharged workman employed as a picket to Schoenthal, and continued:—]

Then Mr. Jenkins pressed on me that the workpeople acted voluntarily, and that nothing was done in the shape of intimidation or terrorism. I think it would be too strong if I were to say that there was. But the pickets do seem to have carried it rather far: they followed one or two persons actually into the premises of the plaintiffs; they stopped another person and searched the bag that he was carrying to see what was in it, and so on; and I do not think it is a case of mere voluntary persuasion. [After further reference to the evidence, his Lordship proceeded:—]

I was told that it was inconvenient to try the question of malice on an interlocutory motion, or afterwards on a motion to commit; and Mr. Jenkins referred to the observation of Lord Esher in *Flood* v. *Jackson* (1), where he said the only recognised tribunal that could decide whether an act is or is not malicious is a jury. I do not understand that to mean that in no case of malice can an interlocutory injunction be granted. It would have been quite unnecessary to make any such statement in a case of that sort; and I take it that it may at times be right to interfere by interlocutory injunction, although the question of malice is involved. It is far better that a question of that sort should be tried where it can by a jury, and not otherwise; but if the question is whether an act admittedly malicious is to be dealt with on interlocutory application or tried at the hearing, it cannot possibly be for the benefit of the public that an admitted wrong should be continued without being stopped. I use those words generally. I do not apply them particularly to the present case. There is this to be borne in mind also, that in most of these cases—I know nothing

(1) [1895] 2 Q. B. 38.

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about the parties who are defendants in the present case, and I am not referring to them—but in most of these cases in which trade unions are concerned the persons who are defendants are such that a decision that there can be no remedy but damages would be equivalent to a decision that there cannot be any remedy at all. Then, in addition to that, I feel assisted a good deal by the observation of Lord Halsbury in *Trollope's Case* (1), where he says in the course of the argument (2): "If you want to forward your own interests by destroying the rights of others, it seems to me that that is express malice."

That being so, I come to the conclusion here that the defendants are endeavouring to destroy the plaintiffs' right of contracting with other persons by an act which is proved to be a malicious act.

Then it was said that it was very inconvenient to try a question of this sort on a motion to commit. I may have to try whether the particular matter which was said to be a breach of an injunction is a malicious act or not. I admit that so to try such an issue would be inconvenient. If the defendants abstained from all such acts there would be no such inconvenience. It would never arise, and there need be no question about its arising. It is quite possible also that they might commit such acts, and they might succeed in covering them up in such a way that no question would be raised; but if a case is made out of malicious interference in breach of an injunction, I see no course but to deal with it in the usual mode.

Under these circumstances it seems to me that I am bound to make, and I do make, an order restraining the defendants from maliciously inducing, or conspiring to induce, persons not to enter into the employment of plaintiffs.

D. P.

C. A. The defendants appealed, and the appeal was heard on March 18 and 19, 1896.

C. E. E. Jenkins, for the appellants. In this case an injunction has been granted on grounds similar to those taken in

(1) 72 L. T. (N.S.) 342. (2) 72 L. T. (N.S.) 344.

Temperton v. *Russell* (1) and in *Flood* v. *Jackson* (2), in which latter case an appeal in the House of Lords has been argued, but judgment has not been given. In view of those authorities I cannot dispute that if people conspire maliciously to induce others not to enter into contracts with a particular person, that is an actionable wrong; but I contend that malice is a question to be tried by a jury, and that an act which apart from malice is not illegal ought not to be restrained by interlocutory injunction: *Trollope* v. *London Building Trades Federation.* (3) The facts in the present case are not substantially in dispute, and I contend that the defendants did nothing but what was legal; their object was not malicious; they only wished to get better terms for their men, and with that view they were at liberty to persuade people not to work for Lyons.

[Lindley L.J. referred to *Flood* v. *Jackson.* (2)]

Flood v. *Jackson* (2) is distinguishable in this respect—that in that case there was no dispute pending; the only object was to punish the plaintiffs for a past act. It is shewn by *Mogul Steamship Co.* v. *McGregor Gow & Co.* (4) that a combination entered into for the benefit of the persons combining is legal, though it may produce injury to others, for the malice there is absent. If picketing is ever legal, the picketing in such a case as the present is so.

[A. L. Smith L.J. referred to the Trade Union Act, 1871 (34 & 35 Vict. c. 31), and the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86).]

I am here to meet a case of malice, and I submit that what the defendants have done can be maintained both under and independently of those Acts. The case of *Mogul Steamship Co.* v. *McGregor Gow & Co.* (4) had no reference to either of those Acts, and it was laid down in that case that a combination for the purpose of benefiting the persons combining is not unlawful. There is no evidence in this case that the defendants were actuated by any motive other than self-interest, or that they were desirous of injuring the plaintiffs' property, and

(1) [1893] 1 Q. B. 715.
(2) [1895] 2 Q. B. 21.
(3) 72 L. T. (N.S.) 342.
(4) [1892] A. C. 25.

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unless that is the case their conduct is not actionable: *Jenkinson* v. *Nield*. (1)

Coming to the Acts, the Trade Union Act, 1871, legalised trade unions to a certain extent. It may be that before the Act of 1875 a strike or a combination to bring about a strike would have been illegal; but now, according to s. 3 of that Act, "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." That section "legalises strikes in the broadest terms," subject to certain exceptions: *Gibson* v. *Lawson*. (2) Before the passing of that Act it was known to the Legislature that strikes were engineered by trade unions. If a strike is legal, a strike engineered by a trade union is legal. How can it be illegal to induce people to do a legal act? It does not matter who foments a strike. Here it was the workmen who wanted it. If it is not illegal to induce one person to strike, it cannot be illegal to induce several to do so. The trade union in this case were entitled to call the plaintiffs' workmen out, and they did so; but there is no evidence whatever of wrongful violence, or intimidation, or injury to property within the meaning of s. 7 of the Act of 1875: *Gibson* v. *Lawson*. (2)

It is contended that a case of malice has been made out against the appellants, and that they have not merely called out the plaintiffs' workmen, but those of Schoenthal also. But that is the same thing, because Schoenthal does not work for anybody but the plaintiffs: *Corporation of Bradford* v. *Pickles*. (3)

[A. L. Smith L.J. Is boycotting lawful?]

That is a different case. It is lawful to combine to get better wages.

[Kay L.J. In order to injure the plaintiffs you are compelling people to abstain from working for Schoenthal. Is that lawful?

Lindley L.J. You cannot make a strike effective without doing more than is lawful.]

The foundation of a strike is dictation. A strike is an attempt

(1) 8 Times L. R. 540. (2) [1891] 2 Q. B. 545, 558.
(3) [1895] 1 Ch. 145; [1895] A. C. 587.

to dictate to an employer. It may, no doubt, produce and foster ill-feeling between master and workman, but the Legislature, knowing that, has legalised strikes. So it is no argument against the legality of what the appellants are doing to say that it was an attempt at dictation, or even compulsion. The effect of a strike is to put pressure on some one, and so in a sense it is to compel, and that has been made legal. As to the picketing, picketing may or may not be an offence within s. 7 of the Act of 1875. It is not an offence unless it is shewn that the pickets have "wrongfully and without legal authority" done some one or more of the five sets of acts specified in the five sub-sections to that section. And if sub-s. 4, which prohibits "watching or besetting," is relied on, that sub-section must be read with the qualifying clause at the end of the section, which expressly provides that attending near the house or place of business of a person in order "to obtain or communicate information" is "not to be deemed a watching" within the meaning of the section. And according to the evidence this is all that the pickets in this case have done. Moreover, in order to bring the case within s. 7, sub-s. 4, of the Act of 1875, it must be shewn that the house or place of business beset is that of the person sought to be compelled. Here, if there be compulsion, the defendants are not seeking to compel the plaintiffs whose shop is picketed, but the workmen or persons who might engage themselves as workmen there. Again, the Court of Chancery does not sit to restrain acts of picketing; and the Legislature has provided a summary procedure before a magistrate of a speedier and cheaper kind for deciding what workmen may or may not do in that way. If there has been an interference, with the rights of property this Court can entertain the question and give relief; but if malice is relied upon, that is not a case for an interlocutory injunction by the Court, but for a jury at the trial: *Flood* v. *Jackson*. (1)

In other respects the arguments on behalf of the appellants were similar to those addressed to the Court below.

Levett, Q.C., and *Ward Coldridge*, for the respondents, were not called upon except as to the form of the injunction.

(1) [1895] 2 Q. B. 21, 37, 38.

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LINDLEY L.J. With regard to the picketing, what the defendants have been doing is not in dispute. They have been placing a few men about the plaintiffs' works, and telling them to accost workpeople and to shew them certain cards. [His Lordship then described these cards, and continued:—] The consequence of these proceedings is that the trade union are in effect preventing Messrs. Lyons from carrying on their business upon such terms as they may choose to arrange with people who come to an agreement with them. Of course, one sees the difficulty in which all these trade unions find themselves. Strikes and trade unions which were formerly considered illegal have now been legalised—at all events, so far as the doctrines as to restraint of trade are concerned—and a strike can be conducted up to a certain point with perfect legality. That is to say, persons can, not only decline individually to work for a master except upon terms which the workmen desire to obtain, but they can combine to do that. They can combine to leave him; they can strike unless he will raise the wages up to what they desire, and trade unions which assist them in withdrawing their own labour and declining to work, and which assist them in supporting themselves during the strike, can legally do so. Then arises a difficulty, which is as well known to those who conduct trade unions as it is to the masters, and to all persons who have experience in these disputes, and it may be put thus: "If that is all that we can do, we may be defeated by the masters making arrangements with other people who may be willing to work for them, either by taking the work home, or by working for less wages than we think is right, and unless we can stop that our strike may be ineffective."

Then comes the struggle.

Now, Parliament has not yet conferred upon trade unions the power to coerce people, and to prevent them from working for whomsoever they like upon any terms that they like; and yet in the absence of such a power it is obvious that a strike may not be effective, and may not answer its purpose. Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other people can be prevented from taking the place of

the strikers. That is the pinch of the case in trade disputes; and until Parliament confers on trade unions the power of saying to other people, "You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon," trade unions exceed their power when they try to compel people not to work except on the terms fixed by the unions. I need hardly say that up to the present moment no such power as that exists. By the law of this country no one has ever, and no set of people have ever had that right or that power. If Parliament chooses to confer it on trade unions it will do so as and when it thinks proper, and subject to such limitations as it thinks proper; but it is idle to pretend not to see that this struggle exists. Trade unions have now been recognised up to a certain point as organs for good. They are the only means by which workmen can protect themselves from tyranny on the part of those who employ them; but the moment that trade unions become tyrants in their turn, they are engines for evil: they have no right to prevent any man from working upon such terms as he chooses.

The Act of Parliament which is most material is the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), the 3rd section of which has a very important bearing upon this case. That Act, in s. 17, repeals several previous Acts relating to the same subject, and, as I believe has been stated before, has become a code as to conspiracy and protection of property. There are other Acts of Parliament relating to trade unions the provisions of which may possibly have also to be consulted; but for the present purpose the Act of 1875 is all that we want. The first clause of s. 3 is an enabling clause: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." Then follow certain saving clauses and provisions applicable to the enabling clause, and a definition of the word "crime"; s. 4 as to breach of contract by persons employed in supply of gas and water; s. 5 as to breaches of contract involving injury to property; and s. 6,

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which is immaterial; and then comes s. 7, which is extremely important, and is as follows: "Every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority" does certain things specified in five sub-sections, shall on conviction thereof by a court of summary jurisdiction, or on indictment, pay a penalty or be imprisoned as therein mentioned; and the first of these specified things is: "(1.) uses violence to or intimidates such other person or his wife or children, or injures his property." Now, that sub-section has been made the subject of judicial decision in the case to which Mr. Jenkins referred, namely, *Gibson* v. *Lawson* (1), and for reasons which are there given the Court held that intimidation was a threat of violence for which a person could be bound over to keep the peace. Whether that was rather a narrow view to take of the clause or not I do not pause to inquire, but that is the construction that has been put upon it. Then sub-s. 2 is: "Persistently follows such other person about from place to place"; then 3 is: "Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof." Then 4: "Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place"; and 5 is: "Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty," and so on. Then comes this clause, which is a proviso: "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

It is obvious, I think, to anybody who reads this with a view simply to understand it, and without any prepossession one way

(1) [1891] 2 Q. B. 545.

or the other, that the Legislature in adding those words did not intend to unsay what it had said above. The obvious intention is to prevent the general words which are found in clause 4 from being stretched to apply to conduct which might possibly fall within a narrow construction of the words and yet not be within the mischief intended to be guarded against. I understand the meaning to be as follows: "That every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority watches or besets the house or other place where such other person," and so on, "shall on conviction" be liable to a penalty; but in construing this language and giving effect to it, Courts are not to treat as "watching or besetting" any "attending at or near a house in order merely to obtain or communicate information." That is to be allowed; and picketing (if you call it so) for that limited purpose, and conducted in that way for that simple object, is not made a criminal offence, and must therefore be taken to be a lawful act. Accordingly, one cannot say as an abstract proposition that all picketing is unlawful, because if all that is done is attending at or near a house in order merely to obtain or communicate information, that is lawful. But it is easy to see how under colour of so attending a great deal may be done which is absolutely illegal. It would be wrong to post people about a place of business or a house under pretence of merely obtaining or communicating information, if the object and effect were to compel the person so picketed not to do that which he has a perfect right to do; and it is because this proviso is often abused and used for an illegal purpose that such disputes as these very often arise.

In this particular case there has not been a large number of persons picketed about Messrs. Lyons' house. As I understand it, there have been but few. The affidavits do not say so; but Mr. Jenkins told us, no doubt perfectly accurately, that there were four, two at a time, in relays of two each. Now, they are not there merely to obtain or communicate information: that is not their function. They are there to put pressure upon Messrs. Lyons by persuading people not to

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enter into their employment; and that is watching or besetting within clause 4, and is not attending in order merely to obtain or communicate information. Under these circumstances they have gone too far, and have gone beyond what the Act of Parliament authorizes, and I do not hesitate to say that it is a case in which from the necessity of the thing a quick remedy is actually and absolutely required.

That leads me to the second point, which is that we ought to leave these people to the summary jurisdiction of a magistrate. I do not think so. This is obviously a case in which a man's property, his trade, his livelihood, and the goodwill of his business will be absolutely ruined if what is complained of is not peremptorily stopped; and according to the well-known principles by which the Court of Chancery has been guided, it is a case in which a person's property and trade are so interfered with that he may come to the Court for the protection which an injunction affords him. I think that North J. was quite right. But the actual terms of the injunction are open to the objection that they are not sufficiently definite, and that if a motion to commit is made upon the footing of that injunction there will not be a sufficiently definite enunciation of what can be lawfully done, or what cannot lawfully be done. The words of the injunction should be varied. I do not think that in varying them we are disagreeing with North J. at all; on the contrary, we are carrying out his idea, but putting it into a better shape.

One word more. Schoenthal's case is one in which it appears to me that the defendants have clearly gone too far, and it is idle to say that their object in doing what they did to Schoenthal was not to compel Messrs. Lyons to do that which the trade union wanted. Schoenthal was the outworker, and what they did was to tell people not to work for him, in order to prevent his working for Messrs. Lyons, and in order to hit Messrs. Lyons through him. That appears to me to be an obvious stretching of the Act which the defendants cannot possibly justify. I think, therefore, that the appeal must be dismissed; but the terms of the injunction will be altered, and, considering that the terms are altered in a way which may possibly be in

Mr. Jenkins' favour, I think that the costs should be costs in the action. Personally I feel under great obligation to Mr. Jenkins for the very able manner in which he has conducted this case. Although the construction which he asks us to put on the Act of Parliament is the wrong one, that does not detract from the ability which he has displayed.

Kay L.J. I entirely agree with the last words of Lindley L.J. I also feel very much indebted to Mr. Jenkins for the manner in which he has conducted his case. The question involved is one of the highest possible importance, because by this case the long struggle which has been going on between trade unions and employers and workmen is brought exactly to a point. I will begin by saying that since the Judicature Act, at any rate, there can be no doubt whatever of the jurisdiction of the Court to grant an interlocutory injunction like this which has been granted by North J. It seems to me quite plain (indeed, in the case of *Bonnard* v. *Perryman* (1) it was admitted) that there is jurisdiction to grant an injunction in cases of libel. Of course, in a case like the present it is not a question of libel. This is an appeal from an interlocutory injunction, and in all these cases of interlocutory injunctions where a man's trade is affected one sees the enormous importance that there may be in interfering at once before the action can be brought on for trial; because during the interval, which may be long or short according to the state of business in the courts, a man's trade might be absolutely destroyed or ruined by a course of proceedings which, when the action comes to be tried, may be determined to be utterly illegal; and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval. Such a case as that may happen, and I am not at all sure that this is not one of that very kind. I can well understand that immense and almost irreparable damage may be done to Messrs. Lyons & Co. if what is now taking place is allowed to continue until the action comes on to be tried. The case is of very great importance. The jurisdiction to grant the injunction appears to me clear; and if the

(1) [1891] 2 Ch. 269.

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defendants are interfering more than they have a right to do with Messrs. Lyons' business, it is clearly a proper case for the Court to stay such proceedings, at any rate until the trial of the action, the injunction being granted on the usual terms that the plaintiffs give an undertaking as to damages, if any should be suffered by the defendants. Now, the defendants are the officers of a trade union, and it seems to me to be very unlikely that any possible damage can result to them from the granting of this injunction; whereas, on the other hand, if it is not granted very grave damage indeed may result to Messrs. Lyons & Co. A primâ facie case of illegality is made out, and upon the balance of convenience and inconvenience an interim injunction ought to be granted. I quite agree that the evidence at the hearing may possibly shew a different state of things; but that seems to be in the last degree unlikely, because the facts are practically undisputed.

What has been done is this: Messrs. Lyons & Co. were giving wages which the Leather Trade Union thought were in some instances too small. Thereupon the trade union give Messrs. Lyons & Co. notice that they object to those wages, and that they shall call out the workmen and induce a strike if those wages are not altered. Messrs. Lyons & Co., abiding by their particular course of business, refuse to raise the wages, and a strike is resolved upon, and this trade union does all in its power to encourage and carry out and make effective the struggle. Before the Acts of 1871 and 1875 the strike itself would have been illegal. The combination of a number of persons to induce and encourage and bring about a strike would also have been an illegal act. But s. 3 of the Act of 1875, which Lindley L.J. has just read, rendered legal "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen," and provided that it should not be indictable as a conspiracy "if such act committed by one person would not be punishable as a crime." There it appears that strikes are legalised by Act of Parliament, and that one person would not be indictable for a crime by endeavouring to encourage or bring about that which in itself is not illegal,

namely, a strike. Therefore a combination of two or more persons to do this would come exactly within the words of the 3rd section of the Act, and would not, since this Act of Parliament, be an offence against the law.

But then it does not go further than that. At present the Legislature has simply legalised strikes, and a strike is an agreement between persons who are working for a particular employer not to continue working for him. Also, I take it that under the terms of the section which I have read it is not illegal for a trade union to promote that strike. But further than that the law has not gone.

Now, what have the trade union been doing in this particular case? In the first place, they have been planting two or three persons at the approaches to the works of Messrs. Lyons & Co. with direct instructions to persuade the workmen coming from or going to those works not to work for Messrs. Lyons. That that is so is put beyond question by the card in the form of a letter which has been read by Lindley L.J., which was put into the hands of these pickets for the purpose of shewing to the workmen who were coming from or going to the works of Messrs. Lyons. On the face of it the card contains a direct request to such persons not to work for Messrs. Lyons. We have to see whether that is an illegal act, because that is one of the things complained of. The other thing complained of is this. Schoenthal was a person who carried on work at his own place of business, and he did a certain amount of work for the plaintiffs. He employed workmen under him separately; and this trade union intimated to him that if he went on working for the plaintiffs they would call out his workmen—not because there was any quarrel between him and them, not because they objected to the wages that he was giving them, not in order to make a strike of the workmen for the sake of those workmen as between them and their own employer,—but for the express and direct purpose of preventing Schoenthal from working for Messrs. Lyons & Co., and of putting in this manner additional pressure upon Messrs. Lyons & Co., so as to induce them to come to the terms which they wished to establish between Messrs. Lyons & Co. and the workmen of Messrs. Lyons & Co.

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Now, are those acts legal? It seems to me that one has only to look at the Act of Parliament to see that it is quite impossible to maintain the legality of either of those acts. I hold distinctly that it is illegal to picket the works or place of business of a man by persons who are distributed and placed there for the purpose of trying by persuasion to induce the workmen of that man not to work for him any longer, or to induce people who want to work for him to abstain from entering into an agreement with him to do so. That seems to me to be illegal; and still more clearly is it illegal to induce a man or to prevent a man in the position of Schoenthal from working for the plaintiff by calling out the workmen of that man, and inducing them not to work for him, that being done for the purpose of putting pressure both upon Schoenthal and upon Messrs. Lyons by preventing Schoenthal from working for Messrs. Lyons. I cannot read s. 7 without seeing distinctly that those things are not permissible by this Act of Parliament, and no Act of Parliament can be referred to which makes them lawful. [His Lordship then read that section, and continued:—]

Mr. Jenkins argued very ingeniously that the expression "with a view to compel any other person" only means to compel any other workmen. I entirely disagree with him. I think that it means to compel either the employer or the workmen. To compel the employer by inducing the men not to work for him seems to me to be precisely within the language of this section. It is watching or besetting a house for the purpose of compelling the employer not to do an act which he has a lawful right to do, namely, to make such terms with his workmen as he and they may mutually agree upon. If that is done by means of persuasion of the workmen, then, although no compulsion is put on the workmen themselves, but the compulsion is by that means put upon the employer, that, nevertheless, seems to me to be distinctly within this section of the Act of Parliament; and this is, I think, more clearly shewn by the proviso at the end of this section. The thing which is made illegal is "watching or besetting" the house or the approach to the house "with a view to compel any other person to abstain from doing or to do any act which such person"

otherwise might lawfully do. Therefore, watching or besetting Messrs. Lyons' place of business with a view to compel Messrs. Lyons to do or abstain from doing an act which they might legally do is an offence against this particular clause of the Act of Parliament, and when you look at the proviso at the end you see exactly how far the parties may go in watching or besetting the house. It says, "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Sub-sect. 4 is as wide as can be. It does not speak of the purpose in that sub-section at all. It is "watching or besetting the house or place of business." The only words controlling the generality of sub-s. 4 are to be found in the beginning of the section, "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing." That is the only thing. Therefore, I repeat that watching the works of Messrs. Lyons for the purpose of persuading persons who were working or intending to work there not to do so with a view to compel Messrs. Lyons to come to the terms which the trade union wish to impose upon them is a direct violation of that which this section prohibits. I think that here the trade union has gone far beyond that which this Act authorizes them to do, and that they are distinctly committing an illegal act which may have the effect of ruining Messrs. Lyons' business if it is not interfered with by an interim injunction. The trade union in this case admit that they put these cards into the hands of the pickets for the purpose of being shewn to the people who were working or intending to work for Messrs. Lyons, and that they placed those pickets at the entrance to Messrs. Lyons' works for the very purpose of persuading the workmen not to work for Messrs. Lyons in order to compel Messrs. Lyons to come to their terms. And I think that it is impossible to suppose that any evidence given at the trial of the action can alter this state of things.

Now, let me take Schoenthal's case. In that case they are

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not merely persuading Schoenthal not to work, but they are trying to prevent his working. They have no right to prevent anybody working; they have no right to prevent one of his workmen working for him. If they use means to prevent his working, that is not encouraging a strike, but it is doing something far more. If by any means they prevent Schoenthal working for Messrs. Lyons, that is an illegal act. They have conspired together and combined to take means to prevent somebody from working for Messrs. Lyons who otherwise would do so. No Act of Parliament justifies that. It would have been illegal before this Act. There is nothing in this Act which justifies it, and it is illegal still. Therefore, I think that the trade union have gone beyond any right which, as yet, Parliament gives them—any right which is to be considered as existing either directly by the legalization of strikes or as incidental to strikes being made legal; and to that extent, both of these things being calculated and intended to injure the plaintiff in his business, it is a case in which an interim injunction should be granted.

The form of the injunction granted by the learned judge may possibly give rise to question. Therefore, we have considered whether it would not be better to make it more specific. I think that we all agree that the injunction should be "an injunction to restrain the defendants, their servants or agents" —in the usual way—"from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information"—that is following the very words of the Act—"and also from preventing Schoenthal or other persons from working for the plaintiffs, by withdrawing his or their workmen from their employment respectively." With that alteration the appeal substantially fails; but still, as it is necessary to make some alteration, the costs of the appeal will abide the result of the action.

A. L. Smith L.J. I also desire to thank Mr. Jenkins for the extremely able way in which he argued this case. His argument has been of great assistance to me.

This is a case of great importance. I wish to state shortly how it strikes me.

Prior to the year 1871 it could not have been said in a court of law that a strike was legal or that picketing was legal, and there is ample authority to this effect. If authorities were wanted I would refer to the cases of *Hilton* v. *Eckersley* (1) and *Walsby* v. *Anley* (2), and other cases which will be found referred to in *Gibson* v. *Lawson*. (3) I say that prior to that date I do not think there can be a doubt that a strike or picketing would have been held to be illegal.

Now the complaint made by Messrs. Lyons is that what the defendants have been doing was illegal at common law. To that the defendants make answer: "That is all very well, your saying that it is illegal at common law; you would have been right before the year 1871; but in the years 1871 and especially in 1875 we, the trade unions, had two Acts of Parliament passed which legalise what we are doing upon this occasion." That these two Acts are really the charters and foundation of the legality of trade unions cannot be denied. There is no doubt that a trade union now, as long as it carries on its affairs up to a certain point, is as legal as any other community or combination in the kingdom. Of that there cannot be a doubt; but Mr. Levett answers, "Yes, you may have those charters, namely, the Act of 1871 and the Act of 1875, yet what you are doing is outside what has been granted to you by the Legislature," and the real question is whether or not it has been shewn that what the defendants have been doing is outside of the powers granted to them by Parliament.

Now, what have the defendants been doing? In the first place they induced Messrs. Lyons' men to strike for the purpose of their getting better wages, which is perfectly lawful. There cannot be a doubt about that; and as regards what they did in inducing Messrs. Lyons' men to go out on strike the Acts of Parliament which have been passed in favour of trade unions undoubtedly allow them to do that. And if that was all that they had done there would be no foundation whatever for an

(1) 6 E. & B. 47.
(2) 30 L. J. (M. C.) 121.
(3) [1891] 2 Q. B. 558.

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application for an injunction in this case. But they have done more. The procedure which they have adopted as regards Mr. Schoenthal is not authorized by the statute. The particular portion of the statute which in reality authorizes these strikes being promoted or encouraged by trade unions is the 3rd section of the Act of 1875. [His Lordship then read that section.] Now, was there any trade dispute between Mr. Schoenthal's workmen and himself? None at all. If there had been a trade dispute between Mr. Schoenthal's workmen and himself, I apprehend that the trade union might have done as regards Mr. Schoenthal exactly that which they did as regards Messrs. Lyons, and they might have called his men out on strike; but that is not the state of things. There was no dispute between Mr. Schoenthal and his men. What the union did was not done in furtherance of a trade dispute between Schoenthal and his men; but what they did was to call out Mr. Schoenthal's men in order to prevent him from working for Messrs. Lyons, and thus to compel Mr. Schoenthal, who was willing to work for Messrs. Lyons, not to work for them, by depriving him of the men wherewith to work for Messrs. Lyons, and by this means to injure Messrs. Lyons in their trade if they did not obey the edicts of the union. In my judgment that is inadmissible under the Acts of Parliament which I have mentioned and was illegal, and inasmuch as the acts were clearly intended to and did hurt and injure Messrs. Lyons in their trade, they were proceedings which this Court has jurisdiction to stop by injunction when it finds that they have been commenced and may continue. That strike of the trade union against Schoenthal was, as I have pointed out in my judgment, illegal.

Now is there anything else? I think that the picketing in this case is also illegal, though a certain amount of picketing (if that is the proper word) was rendered lawful by the proviso at the end of s. 7 of the Act of 1875. The section is clearly directed against what is ordinarily understood by the word "picketing," which really means watching and besetting and stationing men outside a place where a strike has taken place, and where the workmen have been called out, to compel persons

not to go into that place to work for the owner of it as long as the strike lasts. That is the meaning of picketing pure and simple. Now, what does the statute say about it? I will read the first few lines of s. 7 to put my construction upon it: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority," does any of the five acts thereinafter mentioned, shall be liable to punishment. What is the meaning of the words "Every person who, with a view to compel any other person," &c.? I think that section can only be read in this way—that every person who with a view to compel any other person (that must mean whether such other person be master or man)—"every person who, with a view to compel any other person whether master or man to abstain from doing or to do any act" and so on, "wrongfully and without legal authority" does certain acts shall be liable to be convicted, and amongst which acts are these: "watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place." Now, in this case there is ample evidence that the defendants have "watched and beset" the house of Messrs. Lyons, and their own circular points out exactly what they have been doing. They have clearly been picketing Messrs. Lyons' house in a manner which brings them within sub-s. 4 of s. 7. Mr. Jenkins has contended his clients have acted in a lawful manner because what they did was in order merely to obtain or communicate information which, according to the proviso at the end of the section, is not to be deemed a watching or besetting within the meaning of the section; but the evidence shews that this is not so, and that they have done a great deal more than merely obtaining or communicating information. Therefore, it appears to me on this ground also an illegal act has been done by the trade union.

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For these reasons I think that an interlocutory injunction should go, and that it should be moulded in the form which has been read by Kay L.J., because I can see that in the general form in which it has been brought into this Court everlasting

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difficulties would arise as to the carrying out of it; and what is more, it seems to me that it might be said that it would restrain this trade union from doing that which the law allows it to do. By the form in which the injunction goes now it only restrains them from doing what the law does not allow them to do.

I also think that, as we have somewhat altered the injunction, the costs of the appeal should be costs in the cause, so that those who are in the right when the action is tried will get the costs of this appeal.

Solicitors: *Shaen, Roscoe, Massey & Co.; Warburton & De Paula.*

W. W. K.

C. A. 1896 *March* 16, 21.

In re FARNHAM (A LUNATIC), (No. 2).

Lunacy—Bankrupt Lunatic—Property under Control of Trustee in Bankruptcy—Payment into Court in the Lunacy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-s.* 2—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5).

The Court in Lunacy has no jurisdiction to order the trustee in the bankruptcy of a lunatic to pay into court to the credit of the lunacy moneys in his possession or control, for the purpose of enabling the committee to apply the same for the benefit of the lunatic.

In re Farnham ([1895] 2 Ch. 806) explained.

On August 5, 1893, W. E. J. B. Farnham was found lunatic by inquisition, and his wife was appointed committee of his person and estate. On November 13, 1893, under process in an action in the High Court, the sheriff levied an execution by seizure of the goods of the lunatic. The committee claimed the goods; but the sheriff, with notice of the claim, retained them for upwards of twenty-one days, and subsequently sold them in February, 1894. On March 17, 1894, a receiving order in bankruptcy was made against the lunatic by the county court of Northamptonshire, the act of bankruptcy upon which it was made being the levying by seizure and sale of his goods of the execution above mentioned. In May, 1894, the lunatic was adjudicated a bankrupt, and J. D. A. Norris was appointed trustee in the bankruptcy, the proceedings in which were after-

wards transferred to the county court of Leicestershire. The sheriff afterwards paid over to Norris, as such trustee, the moneys representing the proceeds of sale of the goods seized under the execution, and such moneys had since been deposited with the Board of Trade and were standing to the credit of the bankruptcy.

In December, 1895, an order was made that the inquisition taken in the matter of the lunacy should be superseded so far as it found that the said W. E. J. B. Farnham was incapable of managing himself, and that the order of August 5, 1893, so far as it appointed a committee of the person, should be discharged.

On January 22, 1896, the committee of the estate of the lunatic applied, by summons taken out in the lunacy, for "an account of all moneys and property received by or come into the possession or under the control of J. D. A. Norris as trustee in bankruptcy of" the lunatic, and for an order that Norris should pay all such moneys and property into court to the credit of the lunacy. Upon the application coming before Master Maclean he doubted whether the judges in Lunacy had any jurisdiction to make such an order, and the application was adjourned into court, and now came on for argument.

Warmington, Q.C., and *Buckmaster*, for the committee in support of the application. The inquisition in Lunacy was prior in date to the adjudication in bankruptcy, and the administration of all the property of the lunatic is vested in the judge in the lunacy. Any vesting of property upon the adjudication in bankruptcy could only be subject to the rights and jurisdiction of the Court in the lunacy. The former case in the matter of this lunacy, *In re Farnham* (1), was the converse one of an application by the trustee in bankruptcy. It has been decided that the Court in Lunacy has a right to all the property belonging to the lunatic that it can get hold of for the purposes of the lunacy. This money is required for the benefit of the lunatic, and to pay for his maintenance. Further, at the date of the seizure these chattels were in the actual

(1) [1895] 2 Ch. 799.

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custody of the committee. The judges in Lunacy would, therefore, have had power to appoint a receiver of the goods or the proceeds thereof in the hands of the sheriff: see *In re Winkle* (1); and this right is not lost merely because the sheriff has transferred the proceeds to a third party. But if the Court does not see its way to make the order now applied for, or even to give us a charging order, we ask it to sanction an application by the committee to the Court of Bankruptcy in order to obtain this money for the benefit of the lunatic.

[They also referred to the Lunacy Act, 1890, s. 120.]

R. J. Parker, for the trustee in bankruptcy. The judges in Lunacy have no jurisdiction to make this order. This application is a novel one. There is a sum of about 850*l.* left standing to the credit of the bankruptcy. There are numerous unpaid creditors, and the estate is hopelessly insolvent. Mr. Farnham is not incapable of managing himself, and, if this application is acceded to, and the fund which belongs to his creditors and ought to be applied for their benefit is taken away from the custody of the Court of Bankruptcy and applied for his maintenance, he will be in the anomalous and unheard-of position of a quasi-lunatic gentleman at large living (though bankrupt) at the expense of his unpaid creditors. The authorities shew that the judges in Lunacy have no general power to restrain actions against a lunatic or his committee: *Brockwell* v. *Bullock*. (2) And I can discover no case in which the Court has ever gone so far as it is asked to do on the present occasion.

Warmington, Q.C., in reply. (3)

Cur. adv. vult.

March 21. LINDLEY L.J. The question raised in this case is one of some importance, and we have taken a little time to

(1) [1894] 2 Ch. 519.

(2) 22 Q. B. D. 567, 573.

(3) See also as to lunatic bankrupts: *Anon.* (1807), 13 Ves. 590; *Ex parte Stamp* (1846), De G. 345; *Ex parte Layton*, 6 Ves. 440; *Ex parte Cahen*, 10 Ch. D. 183; *In re Lee*, 23 Ch. D. 216; *In re James*, 12 Q. B. D. 332. As to charging orders on bankrupt lunatic's property: *Horne* v. *Pountain*, 23 Q. B. D. 264; *In re Pountain*, Reg's Book, May, 1890; *In re Leavesley*, [1891] 2 Ch. 1; *In re Plenderleith*, [1893] 3 Ch. 332.—W. W. K.

look into it. [His Lordship then stated the facts, and continued :—]

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Counsel for the respondent took the point that we, sitting as commissioners in the lunacy, have no jurisdiction over the trustee in the bankruptcy of Mr. Farnham; and, on looking into the matter, we are of opinion that he is right. This is not the least like the case before us in this lunacy on the former occasion (*In re Farnham* (1)), in which certain property of Mr. Farnham under our control was claimed by his trustee in bankruptcy. The property in question in that case was some plate in court to the credit of the lunacy, and the trustee in bankruptcy asked us to give it up to him. We said, "No, we have jurisdiction over this plate; it is not for the benefit of the lunatic that it should be handed over to you, and we will not do it." In the course of the judgment I then gave there are perhaps some observations which may have led to this application; but it must be borne in mind that here the tables are turned. We were not in that case asserting any right to interfere with the Court of Bankruptcy; but we had in our own custody some plate which we clearly had jurisdiction to deal with under the Lunacy Act, and the observations made were addressed to that state of things. I have looked in vain through the Lunacy Act and the Judicature Act for any section which gives us any jurisdiction in this matter. Mr. Parker kindly furnished me with a list of some authorities bearing on the matter, and among them there is *Brockwell* v. *Bullock*. (2) In that case, in a very elaborate judgment, Fry L.J. dealt with the question, and arrived at the conclusion that there was no jurisdiction to interfere with any other Court.

But it does not quite stop there, because by virtue of the Judicature Act of 1873, as explained in *In re Platt* (3), the Commissioners in Lunacy have, under the terms of their commission, power to sit as judges of the High Court and exercise its jurisdiction. That would not, however, assist the commissioners in this case, because, sitting here as judges of the High Court, we cannot interfere with the jurisdiction of the

(1) [1895] 2 Ch. 799, 806. (2) 22 Q. B. D. 567, 573.
(3) 36 Ch. D. 410.

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county court. It is very true that there is an appeal from the county court sitting in bankruptcy to a Divisional Court of the High Court under the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9), s. 2, which repealed s. 104, sub-s. 2, of the Bankruptcy Act of 1883. But putting those enactments together with the Judicature Act, they do not confer upon us the jurisdiction invoked here. The short answer to this case then is that we have no jurisdiction in the matter. The summons must be dismissed, and I do not see on what principle of justice we can refuse to dismiss it with costs. I do not say the committee will not get the costs out of the estate; indeed, I should think he would, because they have been properly incurred, and he may have been induced to make this application by what took place in the other case.

Then we are asked to sanction an application by the committee to the Court of Bankruptcy with a view to get this money. That is a matter with which the trustee in bankruptcy has nothing to do. It is an ex parte application to us for directions and advice. We have come to the conclusion that it is not for the benefit of the lunatic that such an application should be made. The reasons are shortly these. An application by the committee to the Court of Bankruptcy for payment out of this money would be unsuccessful. That is our deliberate opinion. The only kind of application at all likely to succeed would be one to annul the adjudication. We are rather disposed to think that an application of that kind, if made in proper time, might possibly be successful, the act of bankruptcy having been made since the inquisition. But that is only our opinion, and it is anything but a clear point. Possibly, if the committee were to take that step, it might lead to an appeal to the House of Lords, and the application might ultimately fail. Considering, then, that the estate of this lunatic is not a large one, we are not prepared to say that it is for his benefit to try such an experiment. Under those circumstances we decline to order the committee to make the experiment. We are very much influenced by the lapse of time which has expired since the bankruptcy, and the delay cannot, so far as we know, be accounted for. Under those circumstances we think an applica-

tion to annul the bankruptcy would be very likely to fail on the ground that it ought to have been made before. That increases the danger of the experiment; and, without saying that it cannot be done, or that the bankruptcy could not be successfully impeached, we think it is not for the benefit of the lunatic to try the experiment. Therefore no leave will be given.

KAY L.J. This case is so important that I will add a few observations for the purpose of giving my opinion in my own words.

The application is, so far as I know, perfectly novel. [His Lordship then read the summons.]

No doubt the Court in Lunacy, if that is the proper expression, or the Judges who are entrusted with the jurisdiction in Lunacy, which perhaps is more accurate, have gone very far indeed in this direction. For a long time past it has been recognised as within their power to apply moneys of the lunatic which are under their control in the lunacy for the maintenance of the lunatic, although he may have creditors who are unpaid; and although the application of those moneys may prevent those creditors from ever being paid. The Court has gone as far as that; but there is no case, as far as I know, and none was cited to us, in which the Court has gone any further than that. The Court has never taken property out of the hands of creditors to apply it for the benefit of the lunatic. That would be a monstrous thing. Suppose this money, instead of being in the hands of the trustee in bankruptcy, had been paid to a creditor, would the Court order that creditor to pay it over into the lunacy in order that the lunatic might be maintained out of it? I think the Court has no jurisdiction to do anything of the kind. Its jurisdiction is strictly limited to property within its powers and under its control at the time. In this case the moneys in the hands of the sheriff have been handed over by him to the trustee in bankruptcy of the lunatic; and they are not in the actual custody of such trustee, but are deposited with the Board of Trade, which is very much as though they were deposited in Court. Therefore, they are practically in the hands of a Court whose duty it is, as long as the bankruptcy subsists, to divide those moneys among the creditors of the

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lunatic; and I understand there is not more than enough to pay those creditors, if indeed there is enough. What power has a Court sitting in Lunacy, as we now are, to order a trustee in bankruptcy, still less the Court in Bankruptcy, to hand those moneys over to the committee in order that they may be applied for the benefit of the lunatic? That is taking very nearly as large a step as if they were to order a creditor who has received his debt to hand it back. If not in the actual possession of the creditors in the bankruptcy of the lunatic, the money is in the possession of a trustee for them or of the Court which is acting on their behalf. Unless there were an express statutory enactment giving the Court in Lunacy power under such circumstances to order a third person, in no way party to the lunacy proceedings, to hand the money over in order that it might be applied for the benefit of the lunatic, to accede to such an application as this would be doing something the Court in Lunacy has never attempted to do, and which it has no jurisdiction to do. We asked whether there was any provision in the Bankruptcy Act which conferred that power. None could be found, and I know of none. I cannot imagine that the Legislature would confer upon the judges to whom the jurisdiction is committed a power to order third persons who are no parties to the lunacy to hand over money to the judges in Lunacy.

Then the only thing that the Court could possibly do in this case would be to direct the committee to take proceedings against the trustee in the bankruptcy of the lunatic to get this money in order that the Court might apply it for the benefit of the lunatic. But to take proceedings to get from the trustee in bankruptcy money which belongs to the bankrupt's creditors, in order to apply it for the benefit of the bankrupt himself, would be a very strong thing to do, and I cannot conceive that the judges in Lunacy would ever sanction that.

Then it is said that the bankruptcy might be annulled. On that I give no opinion. Assume it might be. The question remains, is it for the benefit of the lunatic that we should direct the committee to embark in a litigation, which must of course be conducted in bankruptcy, to have the bankruptcy annulled on

the ground that when the act of bankruptcy was committed and the receiving order was made the bankrupt was a lunatic? That would be an experimental action, and I do not know what the result would be. We do know that the property to which this lunatic is entitled is very small, and that a large proportion of it would certainly be absorbed in such a litigation; and, seeing that the object of it would be to take away from the creditors of the bankrupt money to which they are morally and equitably entitled, it seems impossible to say that it is the duty of the judges in Lunacy to direct the committee to embark in a doubtful and costly litigation which would much diminish the fund, would certainly injure the creditors, and might not benefit the lunatic. If there is to be no attempt to annul the bankruptcy, it would place the Court in Lunacy in a ridiculous position if the committee by its direction went to the Court of Bankruptcy and asked it to hand that property over to her to be applied for the benefit of the lunatic; because the only conceivable answer would be that the Court of Bankruptcy could not part with property which it is ordered to apply for the benefit of the creditors.

After the best consideration I can give to the case, I think this application is quite misconceived, and that we can neither order the trustee in bankruptcy to hand this property over, nor direct the committee to take proceedings against the trustee, nor direct proceedings to be taken to have the bankruptcy annulled. Neither course could possibly be for the benefit of the lunatic; and I agree that this application fails and must be dismissed with costs, which I hope the committee will be able to get out of the lunatic's estate.

A. L. SMITH L.J. I agree that the Lords Justices sitting in Lunacy have no jurisdiction over the Court of Bankruptcy, and I would call attention to s. 102, sub-s. 2, of the Bankruptcy Act, 1883, where it is enacted that "a Court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions, except in manner directed by this Act."

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If we were "a Court" within that sub-section we should have no jurisdiction over the dealings by the Court of Bankruptcy with property under its control, and it seems to me that, sitting as Lords Justices in Lunacy, we have none either.

Solicitors: *Prior, Church & Adams; Field, Roscoe & Co.*

W. W. K.

C. A. 1895 STIRLING J. *Dec.* 5, 21. C. A. 1896 *March* 25.

TREVOR *v.* HUTCHINS.

[1875 T. 180.]

Debtor and Creditor—Statute-barred Debt—Executor's Right of Retainer—Payment out of Court.

In 1890 an inquiry was directed as to the persons interested in a fund standing to the account of the legal personal representative of G. H., deceased, the surviving partner in several firms. G. H. had died in 1842, and the fund had been carried to this account in 1883. In 1892 it was found that one-fourth of the fund belonged to G. H., and on August 10, 1893, in the presence of his administrator de bonis non, an order was made carrying over the share of G. H. to a separate account, and directing an inquiry as to the persons beneficially interested in it. F. H. was a creditor of G. H., but his debt had been barred by the Statute of Limitations. Before the inquiry had been answered the personal representative of F. H., who was also administrator de bonis non of G. H., claimed to have the fund paid out to her as legal personal representative of G. H., the object being to exercise a right of retainer over the fund for the debt due to her as personal representative of F. H.:—

Held, by Stirling J., that the Court will not order a fund to be paid out to an executor or administrator having the legal title to a statute-barred debt merely in order to enable him to acquire a right of retainer thereout:

Held, on appeal, that even if the Court would otherwise have done so, the representative of G. H. could not ask to have the fund paid out to her when the effect of so doing would be to defeat the inquiry which had been directed in the presence of the then legal personal representative of G. H.

Adjourned Summons.

This was an action instituted in 1875 to administer the trusts of an insolvency deed for the benefit of the creditors of the firm of Tulloch, Brodie, Halyburton & Co., who failed in 1807. In the course of the proceedings in the action large sums of money were brought into court. Inquiries were made as to the persons entitled thereto, and, upon those inquiries being answered, the

funds in court were in part paid out and in part carried over to separate accounts. By the certificate of the chief clerk, filed on August 2, 1883, it was, amongst other things, certified that the firms of Fairlie, Bonham & Co., David Scott & Co., and David Scott & Co. in joint account with Fairlie, Gilmore & Co., had, amongst others, established their claims as creditors of Tulloch & Co., that the ultimate residue of a sum of 47,252*l.* 14*s.* 3*d.* had been apportioned, and that thereout there was due to Fairlie, Bonham & Co. the sum of 9070*l.* 10*s.* 9*d.*, to David Scott & Co. the sum of 2215*l.* 17*s.* 1*d.*, and to David Scott & Co. in joint account with Fairlie, Gilmore & Co. the sum of 8121*l.* 16*s.* 4*d.*; and these three sums were all directed to be carried over to an account entitled, "Account of the legal personal representative of George Hartwell, deceased, the last surviving partner, when constituted."

Pursuant to that direction these sums were duly carried over to that account, and were invested and accumulated in Consols, and such investments and accumulations were standing to the credit of that account on April 13, 1889. On that day a petition for distribution of the fund was presented by one Major Ricketts, a creditor of the firm of Fairlie, Clark, Innes & Co., who claimed that all the assets of Fairlie, Bonham & Co. and David Scott & Co. had passed to the firm of which he was a creditor, and which in 1833 had assigned its property for the benefit of its creditors, and he prayed that the fund might be distributed accordingly.

George Hartwell, the person named in the title of the separate account, who was the last surviving partner in the firm of Fairlie, Bonham & Co., had died in 1842. In December, 1886, the last surviving executor of his surviving executor died intestate, and he had no personal representative till July 3, 1890, when letters of administration de bonis non of George Hartwell with his will annexed were granted to Francis Grant Hartwell. On August 2, 1890, an order was made on the above-mentioned petition directing inquiries as to the persons interested in the fund; and on November 23, 1892, the chief clerk made a certificate finding that the assets in question did not pass to the firm of Fairlie, Clark, Innes & Co., but remained

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vested in the firm of Fairlie, Bonham & Co.; that one-fourth of the fund belonged to William Fairlie; one-fourth to Henry Bonham; one-fourth to John Innes; and the remaining one-fourth to George Hartwell.

The petition was brought on again on August 10, 1893, when the shares of William Fairlie and Henry Bonham were ordered to be paid out to their legal personal representatives; but the shares of John Innes and George Hartwell were directed to be carried over to separate accounts, and as to the latter share to an account entitled, "The share of George Hartwell, deceased, in the dividends payable to D. Scott & Co. and Fairlie, Bonham & Co.," and an inquiry was directed who were the persons beneficially entitled to the funds so directed to be carried over, and in what shares and proportions. This inquiry was directed in accordance with the rule laid down in *Loy* v. *Duckett* (1), and in the presence of Francis Grant Hartwell.

Upon the inquiry being prosecuted in chambers, it appeared that George Hartwell died insolvent and indebted to, amongst other persons, his son Francis Hartwell, whose debt exceeded the amount in court standing to the last-mentioned separate account. Francis Hartwell died in 1867, having by his will appointed Francis Grant Hartwell his executor, who duly proved the will. Under the grant of July 3, 1890, Francis Grant Hartwell was also the administrator of George Hartwell, and he claimed in chambers to be entitled to set up his right of retainer over the fund in court in respect of the debt due to Francis Hartwell whether it was statute-barred or not.

Francis Grant Hartwell died in 1895, having by his will appointed his widow, Elizabeth Sophia Hartwell, his sole executrix. She duly proved the will, and also obtained letters of administration de bonis non to the estate of George Hartwell, and thus became the legal personal representative of both George Hartwell and Francis Hartwell.

The question of the validity of the right of retainer thus claimed was brought before the Court, and heard by Stirling J. on December 5, 1895.

(1) Cr. & Ph. 305.

Hastings, Q.C., and *Brabant*, for the legal personal representatives of the petitioner, who had died since the presentation of the petition. There is no sufficient evidence that George Hartwell ever owed Francis Hartwell anything whatever. But if any such debt ever existed, it would now be fifty years old and statute-barred, and, under the circumstances, Francis Grant Hartwell cannot have any right of retainer against or out of the fund in court. There can be no retainer without possession. An executor's or administrator's right of retainer only operates as to legal assets actually come into his hands: *In re Jones.* (1) In *Richmond* v. *White* (2) the payment into court was in substance by the executor. Here no part of this fund ever came to the hands or under the control of any legal personal representative either of George Hartwell or Francis Hartwell: *In re Compton.* (3) And the Court will not order payment out of a fund to an executor or administrator in order that his right of retainer may arise in respect thereof.

Buckley, Q.C., and *Fawcus*, for Mrs. E. S. Hartwell, the legal personal representative. The debt due from George Hartwell to Francis Hartwell has been sufficiently proved; and it is clear upon the authorities that an executor or administrator has the right to retain out of assets in his possession or power, as legal personal representative, a debt, whether statute-barred or not, to which he can shew title. In this case the inquiries comprised in the order of August 10, 1893, were directed to be made for the purpose of satisfying the Court that the fund in its custody would come to the hands of some person having both the beneficial and the legal title; and Mrs. E. S. Hartwell has established this title in herself, and can assert her right of retainer over the assets which have been paid into court: *Loy* v. *Duckett* (4); *Richmond* v. *White.* (2) We ask accordingly that the fund in court may be paid out to her so that the right of retainer may attach thereto and be exercised by her.

Hastings, Q.C., in reply.

Cur. adv. vult.

(1) 31 Ch. D. 440.
(2) 12 Ch. D. 361.
(3) 30 Ch. D. 15.
(4) Cr. & Ph. 305.

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1895. Dec. 21. STIRLING J. stated the facts, and continued:—Upon the argument three questions were discussed: (1.) Whether the alleged debt was proved; (2.) whether, if so, it was statute-barred; (3.) whether any right of retainer existed. As to the first two questions, I am of opinion that (1.) the debt has been sufficiently established, and (2.) that it is statute-barred. The third question I have now to decide.

It is well settled that as a general rule an executor or administrator is not under any obligation to plead the statute by way of defence to an action for a statute-barred debt, and may pay such a debt without committing a devastavit: see *Midgley* v. *Midgley*. (1) If, however, a judgment has been made for administration of the estate, then any creditor or other party interested may require the defence to be set up: see *Shewen* v. *Vanderhorst* (2); *Moodie* v. *Bannister* (3); *In re Wenham*. (4)

In like manner an executor or administrator may retain his own statute-barred debt out of assets in his hands: *Stahlschmidt* v. *Lett* (5); *Hill* v. *Walker*. (6) He may assert the right after judgment in an administration action, and after the assets have been paid into court either by himself or by a third party ordered to make such payment in his presence: *Richmond* v. *White* (7); *In re Compton*. (8) If, however, a receiver is appointed, the right cannot be asserted as against assets got in by him: *In re Jones* (9); *In re Harrison* (10); the reason being that (as it is put by Kay J. in the former case) "without possession there can be no retainer." In the present case the fund in court has never been in the hands of any legal personal representative either of George Hartwell, the debtor, or of Francis Hartwell, the creditor; and it is not disputed that at the present moment no right of retainer exists. It is said, however, that the inquiry directed by the order of August 10, 1893, was only ordered to be made in order that the Court might be satisfied that the fund would come to the hands of some one

(1) [1893] 3 Ch. 282, 297–8.
(2) 1 Russ. & My. 347; 2 Russ. & My. 75.
(3) 4 Drew. 432.
(4) [1892] 3 Ch. 59.
(5) 1 Sm. & Giff. 415.
(6) 4 K. & J. 166.
(7) 12 Ch. D. 361.
(8) 30 Ch. D. 15.
(9) 31 Ch. D. 440, 444.
(10) 32 Ch. D. 395.

having a beneficial as well as a legal title to receive it; that the administrator of George Hartwell and Francis Hartwell has made out such a title; and that the Court ought not to offer any obstacle to the payment of the fund to the person having the legal title. I am, therefore, asked to order payment to the administrator in order that he may acquire a right of retainer. That right is, however, an anomaly, and ought not to be extended; and it seems to me that by acceding to the arguments for the legal personal representative I should be extending the rights. Such a course of procedure would be contrary to the analogy which denies the right where the assets have been got in by a receiver; nor is it in accordance with the analogy afforded by ordinary administration actions in which any person interested may require the statute to be set up. Here the Court has taken on itself the administration of the fund, and the petitioner, a party to the proceedings, insists that the fund shall not be parted with. In my judgment the claim of the administrator ought not to be allowed.

W. W. K.

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The legal personal representative of G. Hartwell appealed. The appeal was heard on March 25, 1896.

C. A.

Buckley, *Q.C.*, and *Fawcus*, for the appeal. An executor has a right of retainer out of assets come to his hands, and also out of assets paid into court, for he has constructively received them, except in the case of assets got in by a receiver, as to which it cannot be said that they are constructively received by the executor, for they are got in adversely to him. Here the assets are in court; how they were got in does not appear, but they certainly were not got in by a receiver appointed adversely to George Hartwell's representative, as there has never been any suit for administering his estate. The Court would pay the assets to his legal personal representative, only that in the case of an old fund the Court, according to *Loy* v. *Duckett* (1), will inquire who are beneficially entitled. The case of *In re Jones* (2) decides that there is no right of retainer out of assets

(1) Cr. & Ph. 305. (2) 31 Ch. D. 440.

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got in by a receiver, and shews the reason. In *Richmond* v. *White* (1), where an insurance company paid money into court, the executor's right of retainer was allowed, the money being paid in with his assent. Here assent cannot be relied on; but still there is a constructive possession: no discharge could be given for this money except by me or in my presence.

[KAY L.J. Where the fund has been so long in court, the Court will not pay it to the legal personal representative.]

Loy v. *Duckett* (2) is relied on as an authority for that; but it goes no further than this, that the Court will not pay the legal personal representative in the absence of the parties beneficially entitled. In *Peacock* v. *Saggers* (3) Turner L.J. says that the personal representative has a right to receive the fund; but the persons beneficially interested must have notice: that is the principle of *Loy* v. *Duckett*. (2)

[KAY L.J. referred to the notice of *Loy* v. *Duckett* (2) in *Partington* v. *Attorney-General*. (4)]

Where in an administration action assets are brought into court they are treated as paid to the personal representative: in point of law it is always the executor who receives and pays, though the Court controls his dealing with the funds.

[KAY L.J. According to you, a statute-barred creditor might take out administration and exclude the existing creditors.]

The Probate Division will see to that—it imposes terms on a creditor taking out administration: *Coombs* v. *Coombs* (5); *In the Goods of Brackenbury*. (6) This Court has a discretion as to payment of the fund to a personal representative; but it will not exercise that discretion so as to alter the rights of the parties from what they would be if the funds were not in court.

Hastings, *Q.C.*, and *Brabant*, for the respondent, were not called upon.

LINDLEY L.J. I think that this case does not present any serious difficulty. There is a fund in court which is standing

(1) 12 Ch. D. 361.
(2) Cr. & Ph. 305.
(3) 4 D. F. & J. 406.
(4) L. R. 4 H. L. 100.
(5) L. R. 1 P. & M. 288.
(6) 2 P. D. 272.

to the separate account of "the share of George Hartwell, deceased, in" certain dividends. George Hartwell owed money to Francis Hartwell, and the same person is the legal personal representative of them both. By the order under which this fund was carried over to what I may call the separate account of the executors of George Hartwell, an inquiry was directed in order to ascertain who were the persons beneficially entitled to the fund. That was done in the presence of George Hartwell's then legal personal representative. That inquiry has not been answered, and George Hartwell's legal personal representative comes to the Court and says—before that inquiry is answered —"Give me all this money." Is it right that the Court should accede to that request? We know the object of it. The object of it is to enable the legal personal representative of George Hartwell when she has got this money to prefer herself as the legal personal representative of Francis Hartwell, and pay herself in full in that character what is due to Francis, and leave the other creditors of George to go without any dividend. I shall pursue one question only—whether pending that inquiry which was directed in the presence of George Hartwell's legal personal representative we ought to enable her to defeat its object by paying this money out of court. I think not. The effect would be this. Supposing she had waited until that inquiry were answered, what would be the position of affairs? She, as representative of Francis Hartwell, has no valid claim as a creditor against George Hartwell's estate, because Francis Hartwell's debt has been barred by the Statute of Limitations. She would not, therefore, appear amongst the persons beneficially entitled to this fund under the inquiry to which I have alluded. Of course, if that is so, the right of retainer never will arise at all, because she will not have anything placed in her hands to retain. She has no right to retain until she has got money in her hands. She now, in order to save her from that certificate—in other words, in order to defeat the inquiry which was directed in the presence of the legal personal representative of George Hartwell and Francis Hartwell—asks us to help her to get the money out of court and defeat the inquiry altogether. I do not think we ought to do it. I was rather struck with Mr.

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Buckley's comments upon *Loy* v. *Duckett* (1), but light is thrown upon it by *Peacock* v. *Saggers*. (2) Lord Cottenham in *Loy* v. *Duckett* (1) distrusted the legal personal representative, and thought that if he received the fund there was no security that it would be properly disposed of, and therefore he took the course which was no doubt right, but which was a strong course, that of refusing to pay the fund to the personal representative. Here there is no danger of misappropriation of money in that sense. But there is this danger, that if Mr. Buckley's client gets this money the other creditors of George Hartwell will go without payment. That would be the legal consequence of her getting it. I do not know whether if there were nothing else in the case it would be right to follow *Loy* v. *Duckett* (1); but we have got a very peculiar combination of circumstances, and it appears to me that we ought not to assist the legal personal representative of George Hartwell entirely to defeat the inquiry which was directed on August 10, 1893, in the presence of her predecessor as his representative. I lay some importance upon the fact that the whole object of this application is to get into the position to exercise a right of retainer, and I do not see that there is any principle which compels the Court to assist a person to get into that position. I agree with what James L.J. said, "It is no business of ours either to defeat or to assist the right of retainer"; but when we are asked to do that which is inconsistent with what was done in August, 1893, for the very purpose of enabling one creditor to defeat all the others, I say No.

KAY L.J. I am of the same opinion. There is no suit for the administration of the estate of George Hartwell. In a suit of *Trevor* v. *Hutchins*, which was instituted for the administration of the trusts of a creditor's deed, George Hartwell was found to be a creditor under that deed, and a certain sum was directed to be carried to his separate account in that suit. It was carried to the separate account. That fund cannot be touched except under an order of the Chancery Division of the High Court, and accordingly this application is made in

(1) Cr. & Ph. 305. (2) 4 D. F. & J. 406.

Chancery by the administratrix de bonis non of George Hartwell, who says practically, "I also represent a person who was a creditor of George Hartwell. I admit that debt is barred by the statute long ago; but I say that, in my character as legal personal representative of George Hartwell, I am entitled to have this fund handed out to me. When I get it, I mean of course to exercise the right of retainer, which will then arise for the first time, and I will pay myself in full: the fund is not more than enough to do that, and whoever else is entitled I do not care." I should have the greatest possible hesitation in acceding to that, if the case stood there alone (this fund having been a long time in court), taking the rule in *Loy* v. *Duckett* (1) primâ facie to apply—that the Court will not pay out a fund under those circumstances to a person who happens to have obtained administration, but will find out who is entitled, and try if possible to get the fund into the hands of the people entitled. But the case does not stand there, because we have before us another circumstance which to my mind is conclusive as to what the Court ought now to do, and that is that a former representative of George Hartwell was before the Court at the hearing of a petition by Major Ricketts, who claimed an interest in funds, including this fund, and asked to have it, or part of them, paid to him; and in the presence of that legal personal representative an inquiry was directed to find out who were beneficially entitled to this fund. That was practically following *Loy* v. *Duckett*. (1) The Court did not hand over the fund to the then legal personal representative of George Hartwell, but, in the presence of that legal personal representative, they directed an inquiry as to who were beneficially interested in it. Now, by the admission of the present appellant, the answer to that inquiry will leave her out altogether, because she admits that the debt of Francis Hartwell, of whom she is the legal personal representative, is long barred; therefore the certificate will be to this effect: "This fund belongs to A., B., C., and D., creditors of George Hartwell, and must be divided among them"; and among A., B., C., and D., the present appellant, as personal representative of

(1) Cr. & Ph. 305.

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Francis Hartwell, will not appear. Although that inquiry was directed in the presence of the then legal personal representative of George Hartwell, and has not been answered, the now legal personal representative of George Hartwell comes and says, "Hand over the whole fund to me, that I may retain it in respect of a debt which I admit is barred by the Statute of Limitations, though the certificate when made will certainly exclude me from any claim to the fund." I do not mean to say one word to encourage the idea that a Court of Equity will under any circumstances make an order for the purpose of helping a personal representative to exercise a right of retainer, and oust the other creditors; but still less can it do so after such an inquiry as the one before us has been directed. I think that is a complete answer to this appeal.

A. L. SMITH L.J. I have nothing to add except this. It seems to me that in August, 1893, the right to receive the money was waived, and cannot now be set up.

Solicitors for appellant: *Bone & Heppell.*
Solicitors for petitioner: *Shearman & Rayner.*

H. C. J.

In re DE HOGHTON. DE HOGHTON *v.* DE HOGHTON.

[1876 D. 229.]

C. A. 1895 Nov. 15. 1896 March 30.

Revenue—Legacy Duty—Annuity out of Rents of Realty—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life subject thereto—Legacy Duty Act, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.

A testator who died in 1876 devised real estate to trustees for a term of 500 years, and subject thereto on limitations under which A. became tenant for life. The trusts of the term were to raise and pay out of the rents and profits of the estate an annuity to the person who should, subject to the term, be entitled to the rents and profits; and the testator declared that, subject thereto, the trustees should, during twenty-one years from the testator's death, accumulate the rents and profits and invest them in land to be settled to the same uses; and after the determination of the twenty-one years should pay the rents and profits to the person for the time being entitled to the hereditaments comprised in the term:—

Held (Rigby L.J. dissenting), affirming the decision of Stirling J., that as A. during the period of twenty-one years had in effect a mere charge upon the estate of another person, legacy duty and not succession duty was payable on the annuity.

Shirley v. *Earl Ferrers* (1 Ph. 167) distinguished.

THIS was an appeal from a decision of Stirling J. (1)

Sir Henry de Hoghton, Bart., by his will dated February 9, 1875, appointed his brothers Charles de Hoghton and Richard de Hoghton and his friend R. J. Flowerdew trustees and executors thereof, and devised all his real estates being freeholds of inheritance to his trustees, their heirs and assigns, to the use of the same persons, their executors, administrators and assigns, for the term of 500 years, to commence from the testator's decease upon the trusts thereinafter declared concerning the same, and subject to that term and to the trusts thereof to the use of the said Charles de Hoghton for life, with remainder to his first and other sons in tail male, with remainder to the said Richard de Hoghton for life, with remainder to his first and other sons in tail male, with remainder to the testator's half-brother, James de Hoghton, for life, with

(1) [1895] 2 Ch. 517.

C. A. 1896 *In re* De Hoghton. De Hoghton *v.* De Hoghton.

remainder to his first and other sons in tail male, with successive remainders to the testator's other half-brothers therein mentioned for life, and their respective sons in tail male, with remainders over to the testator's female relatives as therein mentioned.

The will contained a proviso requiring every person becoming entitled subject to the trusts of the term in possession as tenant for life or tenant in tail, and in the case of a married woman becoming so entitled her husband to bear the surname of De Hoghton, and provided for the forfeiture of the estate of any person who or whose husband should fail to comply with this condition. The trusts of the term were declared to be to pay certain annuities bequeathed by the will to the trustees and any other annuities for the time being payable under the will or any codicil thereto, and in particular to pay to the person who for the time being should, subject to the term, be entitled under the will to the possession or receipt of the rents and profits of the devised estates an annuity which was, according to the age of the recipient, to be 1000*l.*, 2000*l.*, or 3000*l.* a year. Subject to that trust, the trustees were directed, during the period of twenty-one years from the testator's death, to accumulate the rents and profits arising from the hereditaments and premises comprised in the term, and apply the same, with the accumulations, upon trust to purchase land and settle the same as nearly as possible in the same manner as the testator's estates thereby devised, and, after the determination of that period of twenty-one years, to pay the rents and profits to the person or persons for the time being entitled to the hereditaments and premises comprised in the term and the reversion expectant on the term. The will contained very wide powers of leasing. These powers were to be exercisable during the period of twenty-one years above referred to, as well as during the minority of any tenant for life or tenant in tail, by the trustees of the term, and the trustees also had power under the will to sell and exchange. The will also empowered the successive tenants for life to charge the estate with a rent-charge in favour of a wife and portions in favour of children, and any appointment under these powers was to take effect in priority

to the trust for accumulations. It was provided that no charge under any such appointment should take effect unless the person so charging, or some issue of such person, should become entitled to the rents and profits of the estate; but, for the purposes of such proviso, the will was to be construed as if the term of 500 years had not been limited therein.

The testator died on December 2, 1876. Richard de Hoghton died on August 17, 1892. Charles de Hoghton died on April 12, 1893; whereupon James de Hoghton succeeded to the baronetcy and became entitled to receive, under the trusts of the term, an annuity of 3000*l.* for the residue of the period of twenty-one years from the testator's death, which period would expire on December 2, 1897, and he also became tenant for life subject to the term. The rents and profits of the estate comprised in the term were largely in excess of the amount required for the annuities given by the will. A petition was presented by the present trustees of the will, of whom Sir James de Hoghton was one, to have it determined by the Court whether legacy duty or succession duty was payable on this annuity. Stirling J. held that legacy and not succession duty was payable.

The Commissioners of Inland Revenue appealed.

Sir Robert Finlay, S.-G., and *Vaughan Hawkins*, for the appellants. By s. 21, sub-s. 2, of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), legacy duty ceased to be payable in respect of any legacy charged upon the real or heritable estate of any person dying on or after July 1, 1888; but this testator having died before that date, it becomes necessary to consider whether this annuity of 3000*l.* to Sir J. de Hoghton is a legacy within 8 & 9 Vict. c. 76, s. 4, which in effect was a re-enactment of 45 Geo. 3, c. 28, s. 4, and of the third part of the schedule to 55 Geo. 3, c. 184. For the present purpose there is no distinction between the several provisions. In *Attorney-General* v. *Jackson* (1), it was held that an annuity charged on the real estate of another person was subject to legacy duty; but in *Shirley* v. *Earl Ferrers* (2) it was held that, if the annuity was in substance charged on the estate

(1) 2 Cr. & J. 101. (2) 1 Ph. 167.

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of the person to whom the annuity was payable, it was not subject to legacy duty. This case falls within the principle of that decision. Looking at the substance and not at the form, the meaning of the testator was that the tenant for life for the time being under the will should, during twenty-one years from the testator's death, enjoy out of the rents and profits 3000*l.* a year. Sir J. de Hoghton is in reality tenant for life subject to a trust to accumulate everything beyond 3000*l.* The real incumbrance is the trust for accumulation. He is tenant for life subject to his interest being reduced to 3000*l.* for the first twenty-one years after the testator's death. The substance of the matter is not that Sir J. de Hoghton has a charge on the interest of the trustees of the settlement, but that the trustees have a charge upon his interest. It is merely a mode of giving him a qualified interest in the land.

Hastings, Q.C., and *Ingle Joyce*, for the respondents. During the twenty-one years Sir James is not tenant for life under the will, and is not entitled to exercise any of the powers of a tenant for life: *In re Strangways.* (1) He is not tenant for life within the Settled Land Act, 1882, because by s. 2, sub-s. 5, the tenant for life is defined as being the person who is for the time being beneficially entitled to the possession of the settled land for life. This annuity cannot be said to be payable out of any interest of Sir James in the land, because the rents are not his during the twenty-one years and never can be his. In no event would the accumulated rents belong to him. That circumstance distinguishes this case from *Shirley* v. *Earl Ferrers* (2), and but for that case it would never have occurred to anybody to say that this annuity was not a legacy within s. 4 of 8 & 9 Vict. c. 76. The trustees are entitled to take every sixpence of the rents subject to the annuity. Sir James is not entitled to the possession or enjoyment of a single acre of the estate during the twenty-one years; he is a mere annuitant for 3000*l.* a year. A devise to a man with a proviso that he shall only take out of the rents and profits a definite sum does not confer upon the devisee an estate in the land.

The Solicitor-General, in reply. Sir James is a person

(1) 34 Ch. D. 423. (2) 1 Ph. 167.

having the powers of a tenant for life under the Settled Land Act, 1882 (see s. 58, sub-s. 1, cl. vi.), and the trustees could not exercise their general powers under the settlement without his consent: *In re Clitheroe Estate.* (1)

Cur. adv. vult.

1896. Mar. 30. Lord Herschell, after stating the facts, continued as follows:—The statute 8 & 9 Vict. c. 76, by s. 4 provides that every gift by any will which shall be payable out of, or charged or rendered a burden upon, the real or heritable estate of the testator, whether such gift be by way of annuity or in any other form, shall be deemed to be a legacy.

It cannot be denied that the gift in question comes primâ facie within these words. But it is said to have been decided that, where the gift, whether by way of annuity or otherwise, is charged upon or payable out of the estate of the person to whom the gift is made, the case is not within the statute. Since the Succession Duties Act came into operation there would in such a case be, it is said, a duty payable in respect of a succession under that Act, and prior to that Act no duty would have been payable in such a case. I will refer presently to the decision relied on.

It has been often said that, in considering whether the case is within the Act relating to legacies or successions, the substance of the matter must be looked at, and not the mere method of conveyancing by which the disposition of the testator's estate is provided for. This is the more necessary, inasmuch as the Acts relate to Scotland as well as England, and the system of conveyancing and the rules by which it is governed are by no means identical in the two countries.

Now I should certainly not be disposed to dissent from the proposition that there may be cases in which a gift, being charged on and payable out of the estate of the person entitled to the gift, is, therefore, not subject to legacy duty. But the question is whether in the present case, when the substance of the matter is looked at and conveyancing forms are disregarded, the annuity to which the respondent is entitled is charged on or

(1) 28 Ch. D. 378; 31 Ch. D. 135.

C. A. 1896 *In re* De Hoghton. De Hoghton *v.* De Hoghton. Lord Herschell.

payable out of his estate in any sense which can give rise to such an exemption. When I speak of disregarding conveyancing forms I am, of course, alive to the fact that the language used must be looked at to see what is taken under a will, and that such language must have its natural legal effect. I merely wish to emphasize the point that you must get behind all that is technical, and find out what the substantial effect of the disposition is. The case is put for the appellants in this way. Sir James de Hoghton, it is said, is tenant for life of the estate, subject indeed to the term, but that is a mere piece of machinery to facilitate the scheme of the testator; the annuity is charged none the less on the estate of which he is life tenant. Now there may, no doubt, be many cases in which, notwithstanding a prior term, it would be quite proper for the purpose we are dealing with to regard the estate as that of the person entitled, subject to the term, and to speak of an annuity charged on it as being payable out of his estate. But what is the state of things in the present case during twenty-one years from the death of the testator? The respondent, Sir J. de Hoghton, is not entitled to enter into possession; he has no right to receive any of the rents or profits; the management of the estate is vested by the will in the trustees; its administration does not rest with the respondent. As far as I can see, his right is to receive an annuity of 3000*l.* a year, and no more. During the period of twenty-one years from the testator's death he can receive no more benefit from it than if he were a stranger to it altogether, and, unless he is alive at the expiration of the twenty-one years, no such right or benefit will ever accrue to him. He has, indeed, a power to charge the estate for certain purposes; but this is a power expressly conferred to charge the inheritance, and not merely his life estate. He acquires it by the express terms of the will, and does not derive it from the fact that, subject to the term, he is made life tenant. Under these circumstances, looking at the substance of the matter, I find myself quite unable to say that the annuity to which he is entitled is charged upon or payable out of his own estate in the sense to which I have referred. It is said that the effect of the will is the same as if

the respondent had been entitled to receive the rents and profits of the estate, and to retain for his own use each year 3000*l.* thereof. I do not think this is so. He would then, at least, have been entitled to enter upon a receipt of the rents and profits, which he is not under the testator's will. The rights which the respondent in fact possesses might, no doubt, have been conferred upon him in different ways. If the estate had been devised to the trustees absolutely, with directions to pay an annuity of 3000*l.* a year and accumulate the surplus income during twenty-one years, and then to settle the estate in such a way that the same persons who are made tenants for life and in tail under the will should become tenants for life and in tail, the position of the respondent would have been in substance the same as at present. He would have received just the same benefit; his annuity would have been secured in the same way. But it would have been then impossible to contend that the annuity was charged on or payable out of his estate. If in that case he would have got just the same pecuniary benefit as at present, it seems to me to follow that in substance the estate on which his annuity is charged, and out of which it is payable, cannot for the purpose we are considering be regarded as his estate. It is true that, if *In re Clitheroe Estate* (1) be correctly decided, the respondent, Sir J. de Hoghton, may be in a position of a tenant for life within the meaning of the Settled Land Act, so that the power of leasing conferred on the trustees by the will cannot be exercised without his consent. I must in this Court take that case to have been rightly decided. I do not think the decision touches the question which we have to determine. I think it is impossible to hold that, if this case could not have been regarded before the Settled Land Act was passed as one in which the annuity was payable out of the respondent's own estate so as to exempt it from legacy duty, it can be differently regarded now. If this be the result, it would be a strange effect, indeed, of legislation dictated by quite different considerations. In my opinion the utmost effect of the Act can be to add this respondent for some purposes to the trustees of the will as a quasi-statutory trustee, whose consent

(1) 31 Ch. D. 135.

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is necessary to certain dealings with the property. The case relied on by the appellants is *Shirley* v. *Earl Ferrers* (1), decided by Lord Lyndhurst. It arose under the earlier Act relating to legacy duty, the 55 Geo. 3, c. 184; but there is no distinction for the present purpose between this and the later statute. In that case a testator devised estates to the use of trustees for the term of 500 years, and subject thereto to other trustees to preserve contingent remainders, with remainder to the first and other sons of Caroline Shirley (then an infant), with divers remainders over. He directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a specified amount) to the maintenance and education of Caroline Shirley until she should attain twenty-one or marry, and that they should accumulate the surplus rents for the benefit of Caroline Shirley when she should attain twenty-one or marry, and, if she should die under twenty-one and unmarried, then for the benefit of the persons entitled under the subsequent limitations, and that, upon her attaining twenty-one or marrying, they should during her lifetime pay the surplus rents, after payment of the annuities, to her for her separate use. Lord Lyndhurst held that legacy duty was not payable. Nothing, he said, but what is a charge upon the estate of another person will come within the statute. It is quite true that in that case, unless Miss Shirley attained the age of twenty-one or married, she would have taken nothing under the will but the allowance referred to, and this is naturally relied on in the present case. But what are the reasons which Lord Lyndhurst gives for holding that the estate on which the legacy was charged was her estate? He says (2): "The direction merely does what this Court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true, the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose: but still the estate out of which the allowance is to come is her estate." Now Lord Lyndhurst may have been right or wrong in think-

(1) 1 Ph. 167. (2) 1 Ph. 172.

ing that the direction merely did what the Court would have done without it, and that the infant would have been entitled to maintenance out of the rents and profits. It is suggested that he was mistaken in this view; but, however that may be, I think it was one of the reasons, if not the main reason, why he regarded the estate as hers. No such grounds exist in the present case, and I am by no means satisfied that Lord Lyndhurst would have disposed of it in the same way. At all events, it does not seem to me to be an authority which compels us to hold that the annuity is exempt from legacy duty because it is charged upon and payable out of this respondent's estate. I do not, of course, for a moment question that this respondent is tenant for life, subject to the term, and that he has as such certain rights. He could, as suggested, in some circumstances join in barring the entail, and, when that was done, in putting an end to the trust for accumulation. But the statute creating the legacy duty applies in terms to the annuity in question; there is no exception in the statute which excludes it. In *Shirley* v. *Earl Ferrers* (1) an exception was implied where the annuity was charged on and payable out of the annuitant's estate. I am bound to admit this exception in such a case as was then in question. In the present case I do not think the annuity was charged on or payable out of this respondent's estate in any sense in which such an exception could reasonably be engrafted upon the plain words of the statute which we have to construe.

A. L. Smith L.J., after stating the facts, continued as follows:—The point in dispute is this: Is this 3000*l.* a year to the enjoyment of which Sir James became entitled upon the death of Charles on April 12, 1893, until the expiration of the twenty-one years, apart from form, in substance a gift by way of annuity payable out of the rents and profits of real estate to which he is entitled—in which case it has been held not to be a legacy within the meaning of s. 4 of 8 & 9 Vict. c. 76: *Shirley* v. *Earl Ferrers* (1) or is it in substance an annuity payable by another, in which case it would be a legacy and within the terms of the Act?

(1) 1 Ph. 167.

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It is not denied either by the advisers of the Crown or of Sir James De Hoghton, that in inquiring what duty is to be paid the substance and not the form of the instrument is to be looked at: one reason for this, I apprehend, being that the taxing Acts refer to both England and Scotland, in which the conveyancing forms differ; the other being that a subject is to pay duty upon that which he in reality comes into the enjoyment of, and not upon that which he may appear to come into upon paper. Now, when the substance and not the form is looked at, how do matters stand?

The term of 500 years is vested in trustees with the obligation imposed upon them of collecting the rents and profits of the devised estate.

In many cases the creation of a term is a mere conveyancing contrivance; but in this case the creation of this term is a reality, one object being by means thereof, as far as possible, to keep the tenant for life out of the enjoyment of the settled estates for the contemplated period of twenty-one years. Sir James, until the expiration of the twenty-one years, is no more entitled to collect the rents than any stranger to the estate. The trustees are to do this, not Sir James. The trustees out of the rents and profits, which they alone are to collect, are to pay Sir James an annuity of 3000*l.* a year and nothing more, and all rents and profits of the estate of whatever kind after making this payment are up to a period of twenty-one years from the death of the testator to be accumulated by the trustees and laid out by them in the purchase of lands. If Sir James happens to die before the expiration of the twenty-one years, he will take no benefit whatever from the accumulations. It is true that by the terms of the will Sir James, subject to the term of 500 years and the trusts declared, takes a life estate; but what until the expiration of the twenty-one years is the tangible interest which he takes? What, apart from form, in substance does he come into? He is not entitled to receive a single sixpence of the rent; the amenities, such as of shooting and fishing, are not his. If capable of being let for value, I apprehend the trustees under the will, notwithstanding the Settled Land Act, are bound to let them. At any rate, Sir

James could not enjoy them without the sanction of the Court; and whether this could be obtained I have not to decide.

In these circumstances, what is it that Sir James came into the enjoyment of upon the death of Sir Charles in 1893? In substance, did he come into a present enjoyment of a life interest in his own estate with a limitation as to its enjoyment, or into the gift of an annuity payable out of the rents to be received by the trustees of the term?

There is obviously a vast distinction when considering a taxing matter between a man coming into a present actual enjoyment of a life interest in an estate, even though subject to a limitation as to its enjoyment, and that of a man who is only entitled to have doled out to him a certain fixed sum of money out of rents and profits which he is not to receive, but are to be received by others, out of an estate the amenities of which he cannot enjoy without the leave of the Court, if obtainable.

In the one case, it appears to me that the man is in possession in truth and in fact of his own estate with a limitation as to its enjoyment; in the other case, though in form it may be his estate, it is not so in substance when considering upon what he is to be taxed, he having no effective interest whatever therein, being only entitled to receive a money payment from another, and nothing more.

The point in the case of *In re Clitheroe Estate* (1) was whether the trustees of a term created by the will of the late Duke of Buccleuch were entitled to effectually exercise the powers of sale contained in the will without the consent of Lord Henry Scott, who was tenant for life of the devised estates; and it was held that they could not do so, for by the Settled Land Act of 1882 his consent was necessary; but it appears to me that this was no decision upon a taxing Act, nor in my opinion do the provisions of the Settled Land Act, which undoubtedly gives largely extended powers to a tenant for life, really affect the question now in hand. That Act was passed *alio intuitu*, and not for the purpose of affecting a taxing Act.

The Crown sought to rely upon the case of *Shirley* v. *Earl Ferrers* (2), in which Lord Lyndhurst, when Lord Chancellor,

(1) 28 Ch. D. 378; 31 Ch. D. 135. (2) 1 Ph. 167.

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held that sums to be annually applied by trustees of a term of 500 years out of the rents and profits of an estate towards the maintenance of a minor were not chargeable with legacy duty, he holding that for legacy duty to become payable under the Act (which was an Act for this purpose the same as the 8 & 9 Vict. c. 76, s. 4), there must be that which is a charge upon the estate of another, or in other words, a person is not to pay legacy duty upon coming into the enjoyment of an estate which is his own. Lord Lyndhurst in that case held that the allowance payable to Caroline Shirley was payable to her for maintenance to which in any event she was entitled, and consequently it could not be said that the allowance did not come out of her own estate, and this is where I think the present case differs from that. Nor does the case cited by the respondents of *In re Strangways* (1) apply to this case; for there by the terms of the will the tenant for life took no estate or interest in possession until the termination of the term thereby created.

I cannot think that the Settled Land Act of 1882 really affects what we have to determine.

It gives, it is true, larger powers to tenants for life than they theretofore enjoyed; but this cannot, I think, alter the way in which a taxing Act is to be applied.

When looking not to the form but to the substance of this case, it appears to me that the 3000*l.* a year is not payable to Sir James out of any estate which in reality he came into the enjoyment of. The only thing Sir James is entitled to until the expiration of the twenty-one years is an annual money payment of 3000*l.* and nothing more; and this seems to me in substance apart from form to constitute a gift by way of annuity payable out of the estate created by the term, and not a limitation upon the tenancy for life, which for the reasons above was not enjoyed by Sir James.

In my judgment, Sir James must pay legacy duty upon the 3000*l.* a year, and succession duty is not the duty now payable.

I therefore am of opinion that Stirling J.'s judgment is correct, and that this appeal should be dismissed.

(1) 34 Ch. D. 423.

Rigby L.J. At the time of making his will the testator, Sir Henry de Hoghton, was without male issue, but had brothers, Charles and Richard, and numerous half-brothers, of whom Sir James, the present baronet, was the eldest. The scheme of the will is to settle the property dealt with in strict settlement, so as to go along with the baronetcy, and only to go to the testator's female issue and collateral female relatives after the fashion of successors to the baronetcy. But the testator was desirous, at the expense of the successive owners of the freehold, to raise a fund for the purchase of additional lands to be settled to the same uses as the property devised. It cannot be supposed that he knew personally how far this could be done; but the scheme of the will, so far as is material for the present purpose, is exactly what would have resulted from instructions to settle the property so as to go as long as possible with the baronetcy, but to apply the income of the successive owners of the estate, with the exception of sums varying according to their ages, but in no case exceeding 3000*l.*, in the purchase of additional property. The law would not allow of such an accumulation for more than twenty-one years, and, if the leading idea—that the successive baronets were to be owners of the estate for the time being—were followed, the directions for accumulation must be of necessity more or less precarious. On the expiration of preceding estates of freehold each successive tenant for life and tenant in tail under the actual limitations takes, notwithstanding the term of 500 years, the seisin in possession of the immediate freehold. His position is essentially different from that of a reversioner or remainderman, and is correctly described as that of the freeholder in possession, subject to the term, just as an owner in fee simple who has made a lease for years is the immediate owner of the fee simple, though subject to the lease. The rents and profits of the property, except in so far as they are expressly withdrawn and diverted from him, go to the freeholder because he is freeholder. In the present case a portion of those rents is withdrawn and diverted from the freeholder to meet annuities to other people, and the rents and profits made subject to the trust for accumulation are also withdrawn and diverted during

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twenty-one years if, but only if, the settlement lasts so long. The tenant for life in possession, subject to the term, is, however, the person who under the old law would have made a tenant to the præcipe, and is now protector of the settlement, and he and the first remainderman in tail could, by a disentailing deed, make themselves entitled to the whole fee simple, subject only to charges taking effect in priority to their estates, and so put an end altogether to the trusts for accumulation during the residue of the term of twenty-one years, if they are so minded. At the same time they could put an end to the trusts for payment of an annuity to the immediate freeholder. Precisely the same question would arise if a tenant in tail under the limitations were in receipt of the annuity. But he, without consulting anybody, could bar the entail and get rid of the trust for accumulation at his pleasure. That the immediate freeholder, whether tenant for life or in tail, takes his annuity in that capacity is clear from the terms in which it is given to him. He will be entitled to it only so long as he retains his freehold estate. If, under the name and arms clause, he forfeits his freehold, or if he grants away his freehold, the annuity limited to him as freeholder ceases to be payable to him. Meanwhile, and before any of the aforesaid events happen, the rents and profits to the extent of the annuity are not taken away from him, as the other rents and profits are, but constitute the residue to which he remains entitled of the rents and profits incident to his freehold estate. That the mere power to receive the rents, or the vesting of powers of management in trustees, would not affect the essential position of the tenant for life as owner of the immediate freehold, except to the extent to which trusts not exclusively in his favour are declared of the rents received, would seem to be clear. His estate might be equitable, and not only all powers of management but the legal ownership of the freehold might be vested in the trustees, and still he would be in the full sense tenant for life. If, however, it can be a matter of importance, it would seem that, as the Settled Land Act, 1882, came into force before Sir James became entitled in possession, the nature of his interest cannot be treated independently of that Act, under which he, and he

alone, would have all powers of management, leasing, sale, and conversion given by the Act, though similar powers are by the will directed to be exercised by the trustees of the term, to the entire exclusion of those trustees, unless he thought fit to consent to their exercising their powers: see *In re Clitheroe Estate*. (1) The successive legal owners of estates for life or in tail under this will are in a very different position from that which would have been the position under an executory devise contained in a direction to settle at a future date, as in *In re Strangways*. (2) For myself, I can see no escape from the conclusion that Sir James, being, on the death of his brother Charles, seised in possession of the immediate estate of freehold, the annuity given to him is nothing more then a return of part of the produce of his life estate so as to take effect out of the life estate limited to him. I think, therefore, that the principle laid down in *Shirley* v. *Earl Ferrers* (3) applies, and that legacy duty is not payable.

Solicitors: *Solicitor of Inland Revenue; Rowcliffes, Rawle & Co.*

(1) 28 Ch. D. 378; 31 Ch. D. 135. (2) 34 Ch. D. 423.
(3) 1 Ph. 167.

H. C. J.

C. A.
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March 27, 28, 30, 31; *April* 1.

CRICHTON *v.* CRICHTON.

[1891 C. 2729.]

Breach of Trust—Following Trust Funds—Satisfaction.

C., tenant for life under his marriage settlement of 1832, got possession of the trust funds and invested part of them in unauthorized securities, among which was 4000*l.* dock stock, in the joint names of himself and his son A. On the marriage of A., C. out of his own moneys settled on A. sums exceeding A.'s share in the funds of the settlement of 1832. In A.'s settlement was included the above sum of dock stock which A. joined in transferring to the trustees; but in the opinion of the Court it appeared from the evidence that A. did not know the origin of the dock stock, nor that it was a fund in which he had an interest; and it appeared that all the negotiations for A.'s settlement had gone on the footing that C. was settling money of his own:—

Held (reversing the decision of North J.), that in a suit by the representatives of C.'s children to have the funds of the settlement of 1832 replaced, A. was not to be treated as having received the dock stock so as pro tanto to reduce the claim of C.'s children to have the trust funds replaced.

THIS was an appeal by the defendants, the personal representatives of the Rev. W. J. Crichton, from a judgment of North J. (1), so far as it decided that sums settled by him on the marriages of his sons were not to be taken in satisfaction of his liability to replace their interests under his marriage settlement. There was a cross-appeal by the plaintiffs from so much of the judgment as decided that a sum which arose from the funds in the father's settlement, and was included in the settlement on the marriage of one of the sons, was to be treated as having been received by that son, and could not be claimed over again.

The father's marriage settlement was dated February 8, 1832, and under it 10,857*l.* Reduced Annuities and 9746*l.* Consols were settled in trust for the wife for life with a restraint on anticipation, after her death for her husband for life, and after the death of the survivor for the issue of the marriage as the husband and wife or the survivor should appoint, and in

(1) [1895] 2 Ch. 853.

default of appointment for the children of the marriage in equal shares. There were two children of the marriage, Arthur and Henry. In 1863 Henry married. In the same year the surviving trustee of the settlement of 1832 died, and the Rev. W. J. Crichton was one of his executors; and in 1864 and 1865, having obtained possession of the settled funds, sold them out with a view to investing them on securities not authorized by the settlement and producing a better rate of interest, and he invested them partly in the joint names of himself and his wife and partly in the joint names of himself and his son Arthur. In 1867 Arthur married, and a settlement was made by the father to an amount greatly exceeding Arthur's share under the settlement of 1832. This settlement included 4000*l.* London and St. Katharine Dock Stock, which had been purchased in the joint names of Arthur and his father out of moneys belonging to the settlement of 1832; and Arthur joined in transferring it to the trustees of his own settlement. The Court of Appeal, however, considered that there was on the evidence no ground to suppose that Arthur knew anything as to the source of this fund, and the evidence shewed that all the negotiations as to this settlement proceeded on the footing that the father was making it out of his own moneys.

In 1887 Mrs. Crichton, the mother, died. The power of appointment in the settlement of 1832 was never exercised.

The Rev. W. J. Crichton died in 1891. Both his sons had died in his lifetime, and the present action was brought by their representatives to obtain restitution of the funds held on the trusts of the settlement of 1832.

The defences were: (1.) a family arrangement for doing away with the settlement of 1832. (2.) As to Henry, satisfaction by a large sum which the father settled on him on his marriage and by sums which the father invested in the joint names of himself and Henry. (3.) As to Arthur, satisfaction by a sum which the father settled on him on his marriage which was of greater amount than his share under the settlement of 1832.

North J. held that the family arrangement was not proved, and that there was no satisfaction. His Lordship, however

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held, that as the 4000*l.* St. Katharine Dock Stock was part of the funds belonging to the settlement of 1832, Arthur must be treated as having received that amount out of those funds, and his representatives could not claim to have it again.

Micklem, and *Nield*, for the defendants. On Arthur's marriage the father settled on him out of his own moneys a much larger sum than Arthur's moiety of the trust funds of 1832. This is satisfaction: *Wood* v. *Briant* (1); *Seed* v. *Bradford* (2); *Chave* v. *Farrant* (3); *Hayes* v. *Garvey* (4); *In re Lawes*. (5) It is shewn by *Plunkett* v. *Lewis* (6) that if a father tenant for life under a settlement gets the trust fund into his hands and on the marriage of a daughter settles on her more than her share, that is satisfaction, and no evidence of the father's intention that it should be so is required. As regards Henry, the settlement made on him was an inchoate satisfaction which satisfied the father's liability when it arose. *Nail* v. *Punter* (7) and *Evans* v. *Benyon* (8) are clear authorities that, Arthur having had the Katharine Dock Stock which was part of the 1832 funds, it cannot be claimed again.

Everitt, Q.C., and *Stock*, for the plaintiffs. The evidence shews that the intention of all parties was that the funds included in Arthur's settlement should be the father's own moneys, leaving their rights under the settlement of 1832 unaffected; so that any presumption of satisfaction which might otherwise arise is rebutted. As to Henry's settlement, no breach of trust had been committed before it was made; so satisfaction there is out of the question. As to the Katharine Dock Stock, Arthur did not know his rights and cannot be held to have received it, the understanding of all parties being that the father was settling his own moneys. The circumstances in *Nail* v. *Punter* (7) and *Evans* v. *Benyon* (8) were so different from those of the present case that those authorities do not apply. The observations in *Evans* v. *Benyon* (8), that

(1) 2 Atk. 521.
(2) 1 Ves. Sen. 501.
(3) 18 Ves. 8.
(4) 2 J. & Lat. 268.
(5) 20 Ch. D. 81.
(6) 3 Hare, 316.
(7) 5 Sim. 555.
(8) 37 Ch. D. 329.

the cestui que trust would have been bound, even if ignorant of his interest, is a mere dictum, for it was found as a fact that he did know it; and the dictum, we contend, is against principle, for there cannot be acquiescence by a person who is ignorant of his rights.

[*In re Salmon* (1) was also referred to.]

Micklem, in reply.

LINDLEY L.J., after giving a short outline of the facts, said that the sons or their representatives had a clear primâ facie right against the father's representatives to have the funds of the settlement of 1832 made good; that the first defence was that a family arrangement had been come to for doing away with the settlement of 1832; but his Lordship held it to be clear that the father, as shewn by a letter written by him in 1867, considered the settlement of 1832 as then in force, and had no intention to put an end to it, that there was no evidence of such intention on the part of the sons, and that the mother could not concur in such an arrangement. This defence, therefore, failed. His Lordship then proceeded:—

The next head of defence is that the father satisfied his liability to make good the trust funds to his sons by the large sums which he gave them when they married or afterwards. That requires investigation, for such a thing is possible. The case of *Plunkett* v. *Lewis* (2) shews that if a father is liable to one of his children for a breach of trust, and on the marriage of that child makes a provision for him or her which is equal to or greater than his liability to that child, there is a primâ facie presumption that he has satisfied that liability.

I will take first the case of Henry. At the time when he married, the surviving trustee of the settlement of 1832 had not died, and to say that what Henry's father gave him on his marriage is to be treated as a satisfaction of a breach of trust which did not exist, and of a liability which had not been incurred, is out of the question.

But it is said that other considerable advances were made to Henry. Most of them were made by placing sums in the joint

(1) 42 Ch. D. 351. (2) 3 Hare, 316.

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names of the father and Henry, and these sums came back to the father, and cannot be a satisfaction. If they had come to Henry, and had been of sufficient amount, the matter would have been more open to question. Even if you take all those advances together, including those which were in the joint names of Henry and the father, they do not amount nearly to the value of Henry's share of the settled funds, and therefore could not be a satisfaction.

As to Arthur the case is different. At the time of his marriage all the funds subject to the trusts of the settlement of 1832 had been sold out, and part of the proceeds was invested in the joint names of the father and Arthur. On Arthur's marriage the father settled on him a considerable sum, quite enough to satisfy the father's debt to Arthur if it was intended to do so; but if the correspondence which passed in relation to Arthur's settlement is looked at carefully, it is, to my mind, clear to demonstration that the father never thought of settling either Arthur's share or anything in respect of Arthur's share under the original settlement. [His Lordship then, after further adverting to the correspondence, said :—] I think that, although Mr. Micklem may be right in saying, on the authority of *Plunkett* v. *Lewis* (1), that the burden is on the plaintiffs of shewing that this considerable sum settled upon Arthur was not intended by the father to be a satisfaction of his liability, the plaintiffs have discharged themselves of that burden, and that the presumption of satisfaction is rebutted.

There is one other point in the case. Arthur's settlement comprehends 7500*l.* London and Katharine Dock Stock, which includes a sum of 4000*l.* like stock bought by the father with part of the proceeds of the sale of the funds subject to the settlement of 1832, and standing in the joint names of Arthur and the father. It is contended, and North J. has acceded to the contention, that this 4000*l.* must at all events be treated as part of Arthur's share under the settlement of 1832. Now, first, did Arthur intend it to be so? There is no evidence whatever that he knew that it was part of what he could claim under his father's settlement. Did the father intend that

(1) 3 Hare, 316.

Arthur or his trustees should take it as part of the funds to which Arthur was entitled under the settlement of 1832? The correspondence, to my mind, shews to demonstration that he did not. The 4000*l.* was in fact treated, like all the rest of the moneys in Arthur's settlement, as money which the father provided, leaving Arthur's claims under the settlement of 1832 entirely untouched. I think that in this part of the case North J. has gone too far. With respect to *Nail* v. *Punter* (1) and *Evans* v. *Benyon* (2), which were relied on by the defendants, the facts in them are so entirely different from those of the present case, that I do not think them applicable. *Nail* v. *Punter* (1) was a peculiar case, in which a person who had obtained from the trustees of his settlement the whole trust fund, and afterwards became bankrupt, tried to make the trustees pay him the money over again as testamentary appointee of his wife. It was a monstrous claim. As regards *Evans* v. *Benyon* (2), so far as it is material here, it comes only to this—that a cestui que trust may be estopped by his own acts from calling his trustees to account. If it could be shewn that Arthur knew anything about the breaches of trust as to the funds under the settlement of 1832, and was condoning or taking advantage of them, that case would apply. It is said that *Evans* v. *Benyon* (2) goes further, and shews that Arthur cannot claim this 4000*l.* over again even if he did not know its origin. I agree that this would be so if the father intended to transfer the 4000*l.* to him as part of his share in the funds settled in 1832; but I am satisfied that the father had no such intention.

I am of opinion, therefore, that the appeal of the defendants must be dismissed with costs, and that the judgment must be corrected in the way asked by the cross-appeal.

KAY L.J., after stating the facts of the case and the primâ facie right of the sons or their representatives to have the funds made good, proceeded as follows:—

It is perfectly hopeless to say that what took place on Henry's marriage in 1863 satisfied a liability which did not

(1) 5 Sim. 555. (2) 37 Ch. D. 329.

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then exist, and which only came into existence in 1864 and 1865. But it was urged that afterwards there was an investment of other funds in the joint names of Henry and the father, and other sums advanced to Henry, and that these are a satisfaction. The first answer is, that these sums did not all together amount to the share of Henry under the settlement; therefore, as satisfaction pro tanto is not allowed, there was no satisfaction by these investments. But further, as Henry died in the lifetime of the father, most of these moneys came back to the father; and to say that moneys invested in the joint names of father and son, which came back to the father, are to be a satisfaction of the liability of the father to the son, would be stretching the equitable doctrine of satisfaction to an absurdity.

Before dealing with the case of Arthur, I will advert to the suggested family arrangement. [His Lordship then considered the evidence, observing that the mother, being restrained from anticipation, could not enter into any such arrangement; that there was no evidence that either of the sons knew of his rights under the settlement, or intended to enter into any arrangement about them; and that the father throughout, as appeared from his own letters, treated the settlement of 1832 as binding and subsisting.] That disposes of the question of family arrangement.

Now as to the alleged case of satisfaction of Arthur's share. I think that, on the whole of the evidence before us, Mr. Crichton had a vague idea of making the fortunes of his sons equal, including what they had under their marriage settlements. If, after having held that there is no satisfaction in the case of Henry, we were to say that there is satisfaction in the case of Arthur, we should seriously defeat that equality. I was for some time much impressed by Mr. Micklem's argument, founded on *Plunkett* v. *Lewis* (1), that the father might be treated as being under a liability to Arthur of about 10,300*l.* in respect of the settlement funds, and that having settled 19,000*l.* of his own money on Arthur, he has primâ facie discharged that liability. [His Lordship here entered into an examination of

(1) 3 Hare, 316.

the correspondence which took place about the time of Arthur's marriage as to his marriage settlement, and stated his conclusion to be that the father intended the settlement on Arthur to be made out of his, the father's, own moneys, leaving unaffected his right to his share under the settlement of 1832.] The first appeal, therefore, fails.

Then as to the cross-appeal. In the settlement of Arthur was included a sum of 4000*l.* London and St. Katharine Dock Stock, worth, I believe, about 2882*l.* That was brought into the settlement, by Arthur and his father concurring in transferring it from their joint names into the names of the trustees of Arthur's settlement. It is plausibly said that Arthur cannot have this twice over. Now try it thus. Suppose Arthur, being (as I believe he was), entirely ignorant of his rights under the settlement of 1832, and being ignorant (as I believe he was) that the stock transferred out of the joint names of himself and his father was part of the settlement funds of 1832, had taken proceedings in the lifetime of his father to compel him to replace the trust fund, could the father have said, "In your settlement you have 2882*l.* of that trust fund." The son might have replied, "I did not bring it into my settlement as a part of the funds to which I was entitled under your settlement. You represented to my wife and her advisers that the moneys comprised in my marriage settlement were moneys of your own which you were settling, and if, in spite of those representations, you made up part of the moneys under my settlement out of part of my share under your original settlement, I have nothing to do with that. You must replace in full the trust funds of the original settlement which have improperly come to your hands." I cannot see what answer the father would have to that. The fact that this money was brought in with Arthur's knowledge or consent, as part of the money which the father represented to be his own money that he was settling upon Arthur, is no answer whatever. Suppose Arthur had taken the course of saying, "I find that you have put into my settlement 2882*l.* part of the moneys to which I was entitled under your settlement which you represented to be still existing. I choose to follow those moneys and take

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them out, and I require the trustees of my settlement to hand them out to me," the result would have been that the father would have been liable to make good that loss to the trustees of Arthur's settlement by putting in moneys of his own to the same amount. Arthur does not get the sum twice over, because what he was entitled to on his marriage was a settlement of the father's moneys to the amount agreed upon, and not a settlement of any part of the moneys to which he was entitled under his father's marriage settlement. Therefore, with respect to North J., I am obliged to differ from him as to this part of his judgment.

A. L. SMITH L.J. I agree.

Solicitors: *Armitage & Strouts; Mullens & Bosanquet.*

H. C. J.

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CHITTY J.

1896

Jan. 28, 29, 30; *March* 3.

[1893 A. 129.]

Charity—Endowed Schools Act, 1869 (32 & 33 *Vict. c.* 56), *s.* 14—*Excepted Endowments—Scheme—Jurisdiction.*

In 1890 a scheme was approved of under the provisions of the Endowed Schools Act, 1869, dealing with certain of the endowments of Christ's Hospital.

Among the endowments excluded from the scheme of 1890 were educational and non-educational endowments which were of less than fifty years' standing on August 2, 1869, the time limited for the commencement of the Act of 1869.

By the scheme of 1890 it was provided that the endowments dealt with by it should be administered by the governing bodies thereby constituted, namely, the governors and the council of almoners, in accordance with the scheme under the name of Christ's Hospital, the result being that with regard to the endowments comprised in the scheme the charity was reconstituted, but with regard to the excepted endowments the old governing body and its powers and duties as constituted and existing at the date of the scheme were left intact, and were wholly exempted from the operation of the scheme.

The scheme under consideration proposed that all the excepted educational endowments should be made over to the governing body constituted by the scheme of 1890, in augmentation of the endowments already comprised therein, and should be dealt with and administered according to that scheme. The scheme was opposed by the existing governing body of the excepted endowments:—

Held, that it was beyond the jurisdiction of the Court to sanction the scheme in the face of the opposition of the existing governing body, their title being founded on Royal Charter and established by Act of Parliament, and no breach of trust being charged.

Sect. 14 of the Endowed Schools Act, 1869, has left the jurisdiction of the Court untouched in regard to endowments within the fifty years' limit; it has neither diminished nor increased the jurisdiction. The section can at most assist the Court in the exercise of its discretion.

ADJOURNED SUMMONS.

This was a scheme relating to the application of certain educational endowments of Christ's Hospital which were excepted from a scheme made under the powers of the Endowed Schools Act, 1869, and approved of in 1890, because such

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endowments having been made less than fifty years before the commencement of that Act, they were under the provisions of s. 14 not within the Act.

The scheme in effect proposed that all the excepted educational endowments should be made over to the governing body constituted by the scheme of 1890 in augmentation of the endowments already comprised therein, and should be dealt with and administered according to that scheme.

The scheme was opposed by the existing governing body of the excepted endowments, who, before the scheme of 1890, were the governing body of all the endowments, and still were the governing body of the non-educational endowments.

Sir R. E. Webster, A.-G., Warrington, Q.C., and *Dibdin*, in support of the scheme.

Byrne, Q.C., and *Vaughan Hawkins*, for the existing governing body of the excepted endowments.

The further facts and the arguments sufficiently appear from the judgment.

The following authorities were cited or referred to: *Philpott* v. *St. George's Hospital* (1); *Re Ashton's Charity* (2); *Attorney-General* v. *Caius College* (3); *In re Prison Charities* (4); *In re Christ's Hospital* (5); *Clephane* v. *Lord Provost of Edinburgh* (6); *Attorney-General* v. *Wyggeston Hospital* (7); *In re Shrewsbury Grammar School* (8); *In re Berkhampstead School Case* (9); *In re Campden Charities.* (10)

March 3. CHITTY J. The scheme submitted to the Court for consideration and approval was prepared under the instructions of the late Attorney-General, Sir J. Rigby, and was supported at the Bar by the present Attorney-General. It relates to educational endowments of Christ's Hospital which were excepted from the commissioners' scheme of 1890, made under the powers of the Endowed Schools Act, 1869. The endow-

(1) 27 Beav. 107.
(2) Ibid. 115.
(3) 2 Keen, 150.
(4) L. R. 16 Eq. 129.
(5) 15 App. Cas. 172.
(6) L. R. 1 H. L., Sc. 417.
(7) 12 Beav. 113.
(8) 1 Mac. & G. 324.
(9) L. R. 1 Eq. 102.
(10) 18 Ch. D. 310; 24 Ch. D. 213.

ments in question yield an income of 3364*l.*, irrespective of upwards of 10,000*l.* which has been accumulated since the scheme of 1890 was passed. The capital value of these endowments is stated to be about 110,000*l.*

The income of the educational endowments included in the scheme of 1890 amounted in 1894 to 45,734*l.* The hospital property in Newgate Street was also comprised in that scheme. It has not yet been sold. The value is very great. It has been estimated to be worth 750,000*l.*

The scheme now under consideration is simple. It proposes in effect that all the excepted educational endowments shall be made over to, or placed under the control of, the governing or administrative body constituted by the scheme of 1890 in augmentation of the endowments already comprised therein, and shall be dealt with and administered according to that scheme. In his reply the Attorney-General submitted that, if the scheme was not accepted in its entirety, the income of the excepted endowments should be temporarily applied to the purposes of the scheme of 1890, and in aid of the income already subject to that scheme.

The Attorney-General's scheme is opposed both in principle and in detail by the existing governing body of the excepted endowments, who, before the passing of the scheme of 1890, were the governing body of all the endowments of Christ's Hospital, and who still are the governing body of non-educational endowments of the hospital. They have brought in a counter-scheme of their own. This counter-scheme is not directly before me on the present occasion for approval. Should the Attorney-General's scheme not meet with approval, he desires to have an opportunity of considering it more closely, and to this he is entitled.

The educational endowments of this magnificent charity were split asunder by the Act of 1869. The severance was effected by s. 14. That section enacts that nothing in the Act contained shall authorize the making of any scheme interfering with any endowment or part of an endowment (as the case may be) originally given to charitable uses less than fifty years before the commencement of the Act (August 2, 1869), unless the

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governing body of such endowment assent to the scheme. The endowments in question fall within the fifty years' limit. The governing body declined to assent to the scheme of 1890. The commissioners were thus placed under the necessity of excluding these endowments from the operation of their scheme. This they did in express terms. On the hearing of this action, I was asked by the counsel for the Attorney-General to declare as a matter of law that these endowments necessarily and expressly excluded were included in the commissioners' scheme. Obviously no such declaration could be made. I then directed that a scheme should be settled of the excepted endowments. The governing body were at first disposed not to object to the direction for a scheme, but ultimately they did oppose it. There was no appeal from my order, and it is now binding on all parties. In directing a scheme I left every question open, holding that all such points as were suggested at the hearing could be better dealt with when any scheme was brought in for consideration and after the parties had adduced their evidence. My reasons for directing a scheme were the altered circumstances arising out of the Act of 1869 and the commissioners' scheme; the fact that the income of the excepted endowments had remained unapplied since the severance in 1890; and the hope, not unreasonably entertained, that with the assistance and advice of the Attorney-General, representing the Crown by virtue of his great office, some proper and reasonable arrangement might be come to between the commissioners and the governing body. The commissioners have power to alter their scheme, but only within the limits of the Act of 1869; and the governing body has been placed, by the 14th section of the Act of 1869, in a position to bargain with the commissioners. Since the order was made there has been much negotiation, but without result. The commissioners, as they are entitled to do, decline to make the alterations in their scheme which the governors suggest. The governors decline to part with the rights which they conceive themselves to be entitled to by virtue of the 14th section and otherwise, unless the scheme of 1890 is modified in accordance with their suggestions. The controversy has centred on the position of the donation governors

under the scheme of 1890 and the privileges formerly enjoyed by them.

The operation of the 14th section of the Act is an important element in this case. The object of the section was to give effect to the intentions of charitable donors within the fifty years' limit by preserving their endowments intact from any interference by the commissioners in the exercise of the large powers conferred on them by the statute. The effect of the Act is remarkable. Speaking generally, and without reference to any special form of gift, the intention of the donors within the fifty years' limit was that their gifts to the hospital should be added to and form part of the general mass of the educational funds of the hospital. But, in the result, and as a necessary consequence of the 14th section and of the refusal of their assent by the governors, those gifts are severed from the general funds and are left as a separate charity to be administered by the governing body as it existed at the passing of the Act and according to the then subsisting constitution of the charity. The result must be taken to have been foreseen by the Legislature. Two classes of cases presented themselves for consideration during the passing of the Act. First, ancient foundations to which additional endowments had been made within the fifty years' limit; and, secondly, entirely new foundations within the limit. Between these two classes a distinction might have been but has not been drawn. The result is that foundations of the first class have been severed into two parts. The additional endowments in the first class might have been directed to follow the destination of the old foundations, but it is not so. They stand by themselves, and constitute in law a separate endowment.

One word more on the 14th section. It has left the jurisdiction of this Court, such as it is, wholly untouched in regard to endowments within the fifty years' limit. It has neither diminished nor increased the jurisdiction. The utmost that can be said on the subject is that, while leaving the jurisdiction of the Court unimpaired, it may form some guide or assistance to the Court in the exercise of its discretion within the limits of its jurisdiction. The policy of the section seems to be that

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the excepted endowments are not to be interfered with unnecessarily.

In the argument the scheme of 1890 was fully discussed. For the purpose of this judgment a short statement of its leading provisions will suffice. It was framed substantially in accordance with the recommendations in the report of the Royal Commissioners referred to in the preamble of the Act of 1869. The preamble states that by their report the commissioners recommended various changes in the government, management, and studies of endowed schools, and in the application of educational endowments, with the object of promoting their greater efficiency and of carrying into effect the main designs of the founders thereof, by putting a liberal education within the reach of children of all classes, and that such object could not be attained without the authority of Parliament. It is plain that the scheme of 1890 could not have been framed without statutory authority. Such a scheme could not have been decreed by this Court. Under the Act of 1869 several appeals were presented to the Privy Council against some of the provisions of the scheme as drawn by the commissioners: *In re Christ's Hospital.* (1) Amongst the appellants were the donation governors. They complained that proper regard had not been paid to their rights of patronage. The Privy Council decided that the scheme which paid regard "not illusory, but substantial" to their rights "could not be successfully impeached as not being in conformity with the Act." The scheme as it now stands was ultimately approved by Order in Council, and became binding on August 2, 1890. It has a statutory force. It was laid on the table of the House of Commons and was the subject of a debate in that House.

The scheme, so far as relates to property comprised in it, made alterations of an extensive nature in the constitution of the hospital. It remodelled and reconstituted the body charged with the power and the duty of general management, and thereby in point of law created a new governing body. It contemplated and provided for the removal of the great boarding school from London, the sale of the site and buildings in New-

(1) 15 App. Cas. 172.

gate Street, the acquisition of a new site for the school, and the erection of new buildings there. It contained provisions for the establishment and carrying on of other schools besides the great boarding school, including ultimately a day school. It cut down the rights of patronage formerly enjoyed by donation governors. Speaking generally, it made great changes in the government and administration of the charity.

The scheme has now been in operation for less than six years. It requires time for its full development. The boarding school has not yet been removed from London. A site at Horsham has been acquired, but no buildings have as yet been commenced. There is no evidence before me to shew how much money will be required for the site and buildings. The Newgate Street property has not been sold. The number of boys in the boarding school has been reduced from 1054 in 1891 to 750 in 1894. This reduction was contemplated by the commissioners. The income of the property comprised in the scheme has down to and including 1894 not been sufficient for the purposes of the scheme. In 1891 (the first year) the deficiency was 6374*l.*; in 1892, 2299*l.*; in 1893, 1536*l.*; in 1894, 2018*l.* The accounts for 1895 have not been presented to the Court; it was stated by counsel for the governing body of the excepted endowments that there would be no deficiency for that year. The available income under the scheme has fallen off gradually from 1891 to 1894. In 1891 it was 51,403*l.*; in 1894, 45,734*l.* The average deficiency of income to meet the expenditure is about 3000*l.* a year. The income of the excepted endowments would supply the deficiency. To meet the deficiency capital funds included in the scheme of 1890 have been sold. The decrease in income during the four years is more than the loss of income through the sales. In their objections to the Attorney-General's scheme, the governors of the excepted endowments say the scheme of 1890 has already proved a failure, and that the failure is in a large measure owing to the practical abandonment of the system of donation governors. It is no part of my function to criticise that scheme except so far only as may be necessary for my decision. But, in justice to those who framed the scheme, I must state that they acted within the

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lines laid down by the Royal Commissioners upon whose report the Act of 1869 was based. And, further, it is true, as was argued by the Attorney-General, that the charity under the scheme of 1890 is still in a state of transition, and that it is premature in the present circumstances to express any final opinion on the questions whether it has or has not partially failed for want of income. At the same time, however, the governors have made good their position that the charity no longer receives the donations and legacies which it formerly obtained from donation governors, amounting to many thousand pounds in the year. I shall recur to this point presently. Relying on the existing circumstances and the financial condition of the main educational charity since the scheme of 1890, the Attorney-General strongly urged that it was fit and proper that the income of the excepted endowments should be applied in aid of the income of the great school as proposed by his scheme. The main objection of the governors is addressed to the jurisdiction of the Court. I proceed now to consider this objection.

The appeals before the Privy Council raised questions affecting the general character and objects of the foundation as well as its governing body, and in the judgment delivered by Lord Halsbury the material parts of the instruments which determine these points were stated. (1) It is sufficient for me to refer to that statement without repeating it at length, but supplementing it with a few additional statements relevant to the present question, and drawing attention to some particular points. The governing body was originally incorporated and constituted governors of the charity by the Royal Charter of Edward VI. By the charter power was conferred on the governors, or a majority of them, at all times thereafter when and as often as to them it should seem expedient, or necessity should so require, to ordain, constitute, and make all such fit, wholesome, and honest ordinances, statutes, and rules for the right government of the charity as to them should seem good; and a like power was conferred on them from time to time to appoint, create, and ordain such and so many officers, ministers, or governors under them in the hospital who might from time to

(1) 15 App. Cas. 172, 176.

time provide for the poor therein that they might well and justly be ordered and taken care of, and also for the order and government of the same poor as to them should seem good and convenient. The objects of the charity in reference to the education of the poor are to be found expressed in general terms in the charter and in the deed of covenant between the King and the Corporation of London, which must be read in connection with the charter. But, although the charitable objects were expressed in general terms, ample power was conferred on the governors (as already shewn) of making ordinances and of appointing officers and governors for the particular regulation and administration of the charity and its property. Certain arrangements with respect to the government of this and the other hospitals, part of the same original foundation, subsequently gave rise to disputes between the City of London, as governors of all the hospitals on the one hand, and the officers and acting governors of the several hospitals on the other; and in the year 1782 the Act 22 Geo. 3, c. 77, was passed for the purpose of giving validity to a settlement agreed on by the disputing parties. The disputes, as recited in the Act, were touching their respective rights, powers, and privileges in the ordering, management, government, and dispositions of the hospitals and the estates, possessions, and reversions and revenues thereof. The agreement settling the disputes was set out in full in the Act. The agreement contained a recital that great benefit had been derived to the charitable institutions from the mode of managing and conducting the same, and from the voluntary contributions, grants, bequests, and donations of the elected governors; and another recital shewing that the agreement as to the actual ordinary management of the hospitals in accordance with the agreement was intended to be perpetual. The Act confirmed and established the agreement according to its tenor. The effect of the Act was, in the language of the judgment in the Privy Council (1), "to establish a separate governing body for Christ's Hospital, with full powers of management over its possessions and affairs." This separate body has continued ever since to manage and administer the

(1) 15 App. Cas. 179.

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charity, subject only to such of its possessions and rights of administration as were expressly taken away from them by the scheme of 1890. No case of breach of trust or maladministration of any kind is suggested by the Attorney-General against the governing body. There is no case of failure of the trusts or of the charitable objects of the excepted endowments. No such point was raised by the Attorney-General, and rightly. It cannot be argued that any such failure has been caused by the operation of s. 14 in severing the funds. The trusts remain and are capable of being executed.

These are the facts which give rise to the question of the jurisdiction of the Court in settling a scheme for the regulation of a charity. The extent and the limits of this jurisdiction were fully discussed in the argument. Many authorities bearing more or less on the present case were cited, and reference was made to an able and useful dissertation on the subject contained in the report of the Royal Commissioners mentioned in the preamble of the Act of 1869, and in great measure founded on the opinions given in evidence before the commission of eminent lawyers, such as Lord Westbury, Lord Hatherley, Sir Roundell Palmer, Mr. Wickens, and others. For the purposes of this decision, however, I think it unnecessary to examine critically the authorities cited or the opinions referred to. I prefer to state my own opinion broadly. I hold that it is beyond the jurisdiction of the Court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the Court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control

over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts cy-près, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than an Act of Parliament will suffice.

I now turn to the scheme brought in by the governors. As the Attorney-General has not had an opportunity of fully considering it, and as his views of such matters are always treated with respect by the Court, the observations which I propose to make will be of a general nature only, and I shall avoid all matters of detail. The leading features of the scheme are (1.) the establishment of a day school in or near London, and (2.) the position of donation governors in relation to the school. The scheme is supported by the evidence brought in by the governors, consisting of the affidavits of the Duke of Cambridge, the president of the hospital, including the part comprised in the scheme of 1890; of Sir E. Moon, as donation governor and member of the committee of almoners; of Mr. Morgan, the treasurer of the entire hospital; and of Mr. Dipnall, the clerk. For the knowledge and experience which these witnesses possess in relation to the hospital, and the deep interest they take in its welfare, I refer to the affidavits themselves. Mr. Garnett, secretary to the London Technical Education Board, speaks to the feasibility of establishing the proposed day school and the need of such a school. The proposed school is obviously within the scope of the charity. The object of the school will be to furnish a useful and high-class commercial education for boys, and also, in a nautical section, special training for sons of commissioned officers in the navy or the royal reserve to fit them for sea service. The nautical section is an important feature in the school. The propriety of establishing a day school of this nature is conceded by the scheme of 1890, which makes provision for ultimately setting up such a school. But on the evidence, as it stands

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practically uncontradicted, and in view of the present financial position and future prospects of the charity under the scheme of 1890, it appears improbable that any day school under that scheme will be established for years to come. Much will depend on the sum obtained from the sale of the Newgate Street property and on the cost of the Horsham site and buildings to be erected there, about which I have not been supplied with any information. After setting forth fully the grounds upon which his opinion is founded, Mr. Morgan sums up the case which he presents by saying that the only prospect of a day school of any kind in connection with the endowments of Christ's Hospital lies in the proposal now made by the governors. Their scheme is consistent with that of 1890. If the governors' day school is founded there will apparently be no need for setting on foot another day school under the scheme of 1890; in fact, the governors' school would operate in relief of the funds comprised in that scheme.

In regard to donation governors, the principal provisions of the scheme are to be found in clause 27. This clause proposes that every existing donation governor and every governor hereafter elected under the provisions of the Act of 1782 in consequence of a donation or bequest of not less than 100*l.* shall be entitled to present one boy for admission, subject to the provisions of the scheme and any regulations in force for the time being; subject as above, vacancies in the school shall be filled up by the donation governors in rotation; and, further, that donation governors shall also have the privilege of presenting in rotation the sons of commissioned officers in the navy and the naval reserve to fill the forty free places in the nautical section of the school. By the 28th clause it is proposed that no boy shall be admitted without passing an examination, which is not to fall short of a fixed minimum standard. No competitive examination is required. During the argument counsel for the governors stated that they were willing to modify the 27th clause, and accordingly handed to the Court a written statement that the existing donation governors were willing to be excluded from all rights of presentation to any day school to be established unless by virtue of a further donation. The

substance of the proposal, then, is to place future donation governors in a position analogous to that which they held in the administration of the entire charity previously to the passing of the scheme of 1890, regard being had to the difference between a day school and a boarding school. This question of the privileges of donation governors was a subject of discussion long before the passing of the scheme of 1890. The report of the Royal Commissioners referred to in the preamble of the Act of 1869 was adverse to the continuation of the system. The Charity Commissioners, who had that report before them and had formed their own opinion on the subject, are not open to any attack in this Court for having reduced the patronage as they did by their scheme of 1890. The Privy Council upheld the scheme on this point as being in conformity with their powers and the Act of 1869, but did not express any opinion on the advantages or disadvantages of the system. But although the Royal Commissioners already referred to and other commissioners had reported adversely to the continuation of the system, opinions favourable to it were entertained by persons conversant with the working of the system, notably Mr. Hare, an inspector of schools under the Charity Commissioners, in his report of 1864. The material passages are stated in Mr. Dipnall's affidavit to which I refer. It appeared to him "to be as good a system as any other yet in existence." It must not be supposed that I am setting up Mr. Hare's authority as equivalent in weight to the authorities on the other side already referred to. It is not a question of authority. What I have to consider is—first, the large power of making ordinances and regulations conferred upon and still exercisable by the governing body; and, secondly, the light which has been thrown on the subject by experience, so far at least as it relates to a question of obtaining funds. It seems to me that I ought to give considerable weight to the views reasonably entertained by the governors on the subject. One of the leading objections was founded on the circumstance that, for every 500*l.* given as a donation, the governors acquired privileges of presentation, the money value of which was 900*l.* It was no part of this objection that the donation governors had in any way abused their privileges. It must be admitted that there were other matters

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which properly entered into the consideration of the subject besides that of money equivalent. Mr. Morgan says, in his affidavit, "The hospital owes its position in the past almost entirely to donation governors, who not only provided the funds for carrying on the institution for so many years, but fostered that personal interest between the hospital and the objects of its benevolence which has always been one of the most attractive features of the institution. This personal interest has been conspicuously shewn by governors to the children presented by them, and has been greatly to the advantage of numberless lads in the way of securing to them openings in life on leaving the school, which otherwise they must assuredly have missed." Dealing with the question from the pecuniary point of view only, it is certain that the scheme of 1890 has not proved attractive to persons who, by virtue of gifts, might have been appointed donation governors. Whether they ought to have been attracted is not the question. As a fact they have not. Giving or not giving rests solely with the man who gives or who does not give. Mr. Morgan deals fully with this subject in his affidavits and the schedules he has prepared. He estimates the loss to the charity from this source at about 11,000*l.* a year. For the period of fifty years preceding 1870 the total amount of donations, called benevolences or benefactions, was over 332,000*l.*, giving an average of upwards of 6600*l.* a year; and the total amount of legacies was 117,990*l.*, and of gifts to the building fund, 27,229*l.* During the period of twenty-five years which have elapsed since the passing of the Act of 1869, the average of donations and legacies has fallen to 3150*l.* a year. The diminution has not been uniform. It began with the apprehensions created by the Act itself; in 1870 the amount was only 1525*l.*, but it subsequently rose and again fell as the year 1890 approached. During the five years from 1890 to 1894, both inclusive, the total amount received by way of donation was 1090*l.*, and by way of legacy, 270*l.* In 1894 there was no donation. Speaking of the present state of things, Mr. Morgan is justified in saying that this method of supplementing the charity funds has died out; and he has, as far as the future is concerned, good grounds for expressing the opinion that it will not revive unless some better means are devised for attract-

ing donation governors to the support of the hospital. There is this further fact in support of the governors' proposal. According to a list made out during the argument, and accepted as correct by the Attorney-General, no less a sum than 63,000*l.* of the excepted endowments was given by donation governors. In this sum of 63,000*l.* donations proper are not included. Thus considerably more than half of the funds to be dealt with under the scheme to be sanctioned by the Court arose from founders, who must be taken to have approved of the system under which they became donation governors. In the observations which he made on the governors' scheme, the Attorney-General seemed to think that the excepted endowments would not be sufficient to establish the governors' day school on a proper footing. This point will have to be attended to. But, if the Attorney-General is right in making this suggestion, there seems to be greater reason for allowing the governors to obtain the additional funds by the means proposed. Mr. Morgan is confident that, if the privileges proposed to be accorded to donation governors are offered, donation governors will in future be attracted to the support of the new day school as in the past they were attracted to the support of the old foundations. From inquiries he has made among persons already friends to the hospital as well as others, he is convinced that, if the day school be established, at least fifty persons will qualify as donation governors by making donations to the funds of the school within three years from the opening of the school.

The result is this. Speaking generally and without committing myself to any details, I hold that the governors have made out their case for establishing a day school of the nature proposed and of attracting support by a system of donation governors substantially as proposed. The matter must go back to chambers to consider the governors' scheme, with liberty, of course, to the Attorney-General, if he desires it, to bring in any further or other scheme not inconsistent with the principles of this judgment.

Solicitors: *Clabon; Beachcroft, Thompson, Hay & Ledward.*

G. M.

CHITTY J. 1896 March 18, 19, 24, 31.

WHITWHAM *v.* WESTMINSTER BRYMBO COAL AND COKE COMPANY.

[1893 W. 1662.]

Damages—Injury to Land—Trespass by tipping Spoil—Way-leave—Measure of Damages.

The defendants having trespassed on the plaintiffs' land by tipping spoil thereon from their colliery :—

Held, that, though the trespass was committed openly and with the knowledge of the plaintiffs, the principle of the way-leave cases such as *Martin* v. *Porter* (5 M. & W. 351), *Jegon* v. *Vivian* (L. R. 6 Ch. 742), and *Phillips* v. *Homfray* (L. R. 6 Ch. 770) applied, and that the value of the land for the purposes for which it was actually used by the wrongdoer ought to be taken into consideration in assessing the damages for so much thereof as was covered with spoil, and that as to the rest the measure of damages was the diminished value thereof to the plaintiffs by reason of the wrongful acts of the defendants.

Motion to vary the report of one of the official referees, which raised the question as to the measure and method of assessing the damage done to the plaintiffs' land by a trespass committed by the defendants in depositing spoil thereon from their colliery. The facts, so far as material, were as follows :—

The plaintiffs were the owners of 1A. 3R. 9P. of land situate in a long, narrow valley to the north of the defendants' colliery ; in 1888 this was the only land on the north side, within a reasonable distance, which the defendants could have procured for tipping purposes. The defendants had used this land since March, 1888, for the deposit of spoil from their colliery, and in the course of their operations had covered some 3R. 20P. with spoil. The defendants claimed the right to use the land for this purpose by virtue of an agreement ; but at the trial of this action before Romer J. in March, 1894, it was held that there was no such agreement. By the judgment it was declared that the land in question belonged to the plaintiffs, and that the defendants had been guilty of committing a trespass upon the land by tipping or depositing thereon spoil, and an injunction was granted restraining them from further tipping. It was

further ordered that the defendants should deliver possession of the land to the plaintiffs, and an inquiry was directed what, if any, sum of money was proper to be awarded to be paid by the defendants to the plaintiffs by way of damages for injury sustained by the plaintiffs since March, 1888, by reason of the defendants' trespass by tipping or depositing spoil or other materials upon the land.

On August 3, 1895, the official referee made his report, in which, after finding the amount of damages to be 200*l.*, he proceeded as follows:—

(2.) The defendants have by their trespasses since March 24, 1888, rendered land belonging to the plaintiffs, 1A. 3R. 9P. in extent, valueless for any but tipping purposes.

(3.) In assessing the said sum of 200*l.*, I have taken as the measure of damage the diminished value of the plaintiffs' land, in extent 1A. 3R. 9P., caused by the defendants' said trespass since March, 1888.

(4.) The plaintiffs contended before me, through their counsel, that the proper measure of damage was the reasonable value to the defendants on March 24, 1888, of the plaintiffs' land for tipping purposes, and claimed interest at 4 per cent. on such value from the respective dates at which the tipping was done.

(5.) If the proper measure of damage be that mentioned in paragraph 4, I find that the sum to be paid to the plaintiffs as damages is 963*l.*, and 141*l.* 5*s.* interest, making together the sum of 1104*l.* 5*s.*

(6.) In either case, on whichever basis the damages are assessed, I am of opinion that the costs of the inquiry should be paid by the defendants.

The way in which the referee arrived at these results is sufficiently discussed in the judgment.

The plaintiffs now moved to vary the report, claiming damages and interest in accordance with the alternative finding in paragraph 5 of the report.

F. Thompson, for the plaintiffs. The proper measure of damages is the reasonable value of the land for tipping purposes,

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the purpose for which it was used by the wrongdoer. The principle laid down as to compensation for a way-leave in *Martin* v. *Porter* (1), *Jegon* v. *Vivian* (2), and *Phillips* v. *Homfray* (3) applies here. The wrongdoer is not allowed in equity to make a profit out of his own wrong, and the value of the land for the purposes for which it was actually used by the wrongdoer ought to be taken into consideration: this principle was not followed by the referee when he assessed the damages at 200*l*. The alternative finding in paragraph 5 is the correct one. *Marsh* v. *Jones* (4) and *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (5) shew that interest by way of damages can also be given.

C. A. Russell, for the defendants. The measure of damages is the diminished value of the property, not the sum which is necessary to restore it to its original condition: *Jones* v. *Gooday* (6); *Hosking* v. *Phillips* (7); Maine on Damages, 5th ed. p. 430. The benefit to the wrongdoer is not to be considered. The way-leave cases relied on by the plaintiffs are very special, and do not apply to an open trespass like the present. In *Phillips* v. *Homfray* (3) the trespass was surreptitious and guilty: that is not the case here. The plaintiffs are now in effect claiming the fee-simple value of the land, not damages for its diminished value by reason of our wrongful acts. No interest should be allowed; it is not a case of keeping the plaintiffs out of their money; the alternative finding of the referee is quite wrong.

Thompson, in reply. The principle of the way-leave cases is not confined to guilty or surreptitious trespass. The fact that the wrongful user was open makes no difference. The innocent trespasser pays the fair market value of the coal at the pit's mouth, less the expenses of getting it there; the guilty trespasser pays more.

[CHITTY J. By way of "exemplary damages," as in *Merest* v. *Harvey*. (8)]

(1) 5 M. & W. 351.
(2) L. R. 6 Ch. 742.
(3) Ibid. 770.
(4) 40 Ch. D. 563.
(5) [1892] A. C. 166.
(6) 8 M. & W. 146.
(7) 3 Ex. 168.
(8) 5 Taunt. 442.

In *Phillips* v. *Homfray* (1) the damages were not assessed because the act was surreptitious. *Jones* v. *Gooday* (2) is an instance of destructive trespass, not accompanied, as here, by any benefit to the trespasser. The referee has not taken into account the value of this land for tipping purposes.

Cur. adv. vult.

March 31. CHITTY J. The question is what is the measure of damages in the circumstances of this case. [After stating the result of the trial of the action before Romer J., and the terms of the inquiry, which, he observed, left open the question of the measure of damages, his Lordship continued:—]

In answer to the inquiry the official referee has made a special report. He finds, first, that the sum proper to be paid by way of damage is the sum of 200*l.*; secondly, that the defendants have by their trespasser rendered land belonging to the plaintiffs, 1A. 3R. 9P. in extent, valueless for any but tipping purposes; and, thirdly, that in assessing the 200*l.* he had taken as the measure of damage the diminished value of the plaintiffs' land, in extent 1A. 3R. 9P., caused by the defendants' trespass. In arriving at the 200*l.* the referee appears to have taken the land at its agricultural value, striking a mean between the estimates of the valuers, and making an allowance in respect of a cottage affected. Here the referee has followed the rule ordinarily applied in actions for injury to land: see Mayne on Damages, 5th ed. p. 430. In *Jones* v. *Gooday* (2), where the defendant in widening a ditch had cut into the plaintiff's land and carried away soil, it was decided that the plaintiff was entitled to be compensated for the loss he had actually sustained, and not for the expense of restoring the land to its original condition. The plaintiffs do not contend that the measure of damages is the expense of restoring the land to its former state; but they contend that the proper measure is the reasonable value of the land for tipping purposes, being the purposes for which the defendants actually used the land. After referring to this contention with a claim for interest, the referee finds, that if the proper measure of damage be that so contended

(1) L. R. 6 Ch. 770. (2) 8 M. & W. 146.

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for, the sum to be paid is 963*l.* and 141*l.* 5*s.* for interest, making together 1104*l.* 5*s.* The question, then, is whether the value of the land for tipping purposes ought to be taken into consideration in assessing the damage. The plaintiffs' land is situate in a long, narrow valley to the north of the defendants' colliery, which is a short distance off. There is no other land on the north of the colliery within a reasonable distance which the defendants could have procured for tipping purposes. The sum of 963*l.* is arrived at by treating the tipping value at 500*l.* an acre. Of the total area of the land 3R. 20P. have been covered by the defendants with spoil; the remaining portion, 3R. 29P., is still available for tipping purposes, but for no other purpose. There is no authority directly in point. The plaintiffs rely on the decisions in reference to mining operations as shewing the true principle. In *Martin* v. *Porter* (1) Parke B. directed the jury that the plaintiff was entitled to compensation for the defendants passing through his coal mine with coals gotten from his own mines, and ought to pay as for a way-leave. Under the leave given to move to reduce the damages, the point whether this direction was right might have been raised; but it was not raised on the motion made. The actual damage sustained by the plaintiff by reason of the wrongful user of the underground way would have been trifling; but the principle acted upon was, that the plaintiff was entitled to be compensated upon the footing of a grant of a way-leave at a reasonable rent, which was shewn to be 2*d.* a ton in the neighbourhood. In *Jegon* v. *Vivian* (2) the Master of the Rolls (Lord Romilly) and Lord Hatherley held that the plaintiffs were entitled to an inquiry what ought to be paid by way of way-leave for the passage of coal through their mines. In that case the defendants were trespassers who had held on after a lease granted by a tenant for life under a power, which lease was avoided by the plaintiffs, the reversioners. In regard to the coal which they had wrongfully gotten, the defendants were ordered to pay damages, not on the more severe principle, but on the principle of their being (to use a phrase employed in these cases) "innocent trespassers"; yet in regard to the way, they had to

(1) 5 M. & W. 351. (2) L. R. 6 Ch. 742.

pay compensation on the footing of a way-leave. In *Phillips* v. *Homfray* (1) the damages were directed to be assessed on the same principle; but there the appellants were treated as wilful or guilty trespassers.

Now the question is whether the principle of the way-leave cases applies to a case of tipping. They are founded on the principle that a wrongdoer shall not make a profit out of his own wrong, and that the value of the land for the purposes for which it was actually used by the wrongdoer ought to be taken into consideration. There is this distinction between the way-leave cases and the case before me, that the user of the way for the passage of coal is underground, and, in some instances, surreptitious; whereas in the case of tipping the user is on the surface and open; in the present case the fact appears to be, that the plaintiffs were aware that the tipping was going on. But I cannot see that this distinction makes any substantial difference. I think that the principle does apply, and that the plaintiffs are entitled to damages on the basis of what would be a reasonable sum to be paid for the use of their land by the defendants for tipping purposes.

But applying this principle consistently to the facts, I think that the plaintiffs are not entitled to the whole of the 1104*l.* 5*s.* First, in regard to interest claimed, I think that all interest ought to be excluded from the computation of damage. To give interest would be to treat the plaintiffs as having invested their damages at interest in the hands of the defendants. Secondly, on the principle which I adopt I think the plaintiffs are entitled to damages on the higher footing for so much only of the land as was actually used by the defendants for tipping. The plaintiffs at the trial obtained an injunction restraining the defendants from further tipping; the defendants cannot therefore use the rest of the land for tipping. To make the defendants pay the whole of the 963*l.* would be to make them pay for the fee-simple value of the land for tipping when they have used part only of the land for that purpose, and are prevented by the injunction from so using the remainder. There is still an unexhausted tipping value in part of the land. It was

(1) L. R. 6 Ch. 770.

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admitted by counsel, as I understood, that of the total area of 1A. 3R. 9P. only 3R. 20P. were covered by spoil, and that the remainder, namely, 3R. 29P., or rather more than half, was still available for tipping, although valueless, as the referee finds, for any other purpose. It would be unjust to make the defendants pay for the 3R. 29P. on the principle of a tipping leave which they have not directly or indirectly enjoyed. In respect of this part of the land the defendants ought to pay on the footing of the diminished value of the land to the plaintiffs. The plaintiffs' counsel said that on the evidence it would be impracticable for the plaintiffs to sell or let the 3R. 29P. for tipping purposes to any persons other than the defendants; and that the defendants, having found land to the south of their colliery, no longer required, and would not take, this portion of the land for tipping. Assuming this statement to be correct, it is immaterial. The plaintiffs cannot recover any greater sum for damages than is given by the just application of the principle which they invoke.

I take it that the parties will be able readily to apportion the damages in accordance with this judgment. If they cannot agree, the matter must go back to the referee with a proper direction.

[The sum of 550*l.* was subsequently arranged by counsel in court as the amount of the damages to be awarded in accordance with the judgment, and for this sum interest at 4 per cent. from the date of this judgment was given. The defendants were also ordered to pay the costs.]

Solicitors: *Field, Roscoe & Co., for Evan Morris & Co., Wrexham*; *Norris, Allens & Chapman, for J. B. Pollitt, Manchester.*

W. C. D.

In re POLLARD'S SETTLEMENT.

CHITTY J.

1896

April 14, 15.

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39—*Debts caused by Extravagance—Money-lender.*

In exercising its discretion under s. 39 of the Conveyancing Act, 1881, the Court has to balance the undoubted benefit of the restraint against the alleged benefit of its removal, and to see whether, in all the circumstances, the benefit of the removal preponderates.

The Court will not yield to applications under the section in cases where it is sought to remove the restraint in order to raise money for the payment of debts which have arisen through the extravagance of the married woman or her husband, and the restraint will not be removed in cases where the married woman has borrowed the money from a professional money-lender.

MOTION by a married woman to discharge an order made in chambers refusing an application under s. 39 of the Conveyancing and Law of Property Act, 1881, to relieve her from the restraint on anticipation contained in the settlement, to enable her to raise two sums of 600*l.* and 200*l.*

The circumstances and the facts are sufficiently set out in the judgment.

Farwell, Q.C., and *Johnston Edwards*, for the applicant.

Eyre Thompson, for the trustees of the settlement.

CHITTY J. Applications like the present are usually heard in chambers. That course is more convenient, as the judge can ask questions there which had better not be asked in open court. The Court of Equity established the doctrine with reference to the restraint on anticipation, considering that it was for the protection of the married woman, and that it was for her benefit that a provision should be secured to her which she was incapable of anticipating during coverture. Cases however arose, of which *Robinson* v. *Wheelwright* (1) is an example, where it was clearly for the benefit of the married woman that the restraint should be removed, but where the Court held that it could not remove the restraint. These cases led to the passing of s. 39 of the Conveyancing Act, 1881.

(1) 6 D. M. & G. 535.

CHITTY J. 1896 *In re* POLLARD'S SETTLEMENT.

This enactment conferred a discretionary jurisdiction on the Court which ought not to be exercised unless it is clearly for the benefit of the married woman. The Court has to take into consideration all the circumstances of the case, and it has to balance the undoubted benefit of the restraint against the alleged benefit of its removal, and to see whether the benefit of the removal actually preponderates. There are numerous applications by married women under this section in chambers. The usual practice is to serve the trustees of the settlement on the application, but it is not necessary to do so. The trustees frequently do not desire to oppose. The applications, therefore, being often practically ex parte, the Court has to look at the evidence with some jealousy.

There are many cases where it is thought advisable to pay what are called the married woman's debts, which are not unfrequently in reality the debts of the husband. Even then it might be for her benefit to relieve her from difficulties in which the whole family is placed. There are other cases where the debts have been incurred through no extravagance either of the husband or wife, nor by any fault of theirs, as where the family has got into difficulties through illness and the extra expenses of doctors, nurses, and the like.

Recently, however, attempts have been made by married women, who have got into debt either through their own or their husband's extravagance, to endeavour to obtain in chambers orders for the removal of the restraint. If the judge were to yield to such applications, the result would easily be forecast by solicitors. The married woman has only to involve herself in difficulties and to make piteous affidavits. If such a system got into vogue the married woman would be able to force the hand of the Court, and in effect destroy the restraint on anticipation.

In the case before me, the applicant married her first husband in 1882. In 1892 she obtained an order in chambers under the section in order to raise a sum of 2000*l*. Her net income was then about 1067*l*. a year. The effect of the order which was made in April, 1892, was to relieve her from the restraint on anticipation to the extent of an annual sum of 400*l*. I may say

here that my practice is to cut out of the income an annuity sufficient to enable the married woman to borrow the required sum on reasonable terms, leaving the rest of her income subject to the restraint. The result of this order was that her income was reduced by 145*l.* In the early part of 1893 she obtained on her own petition a divorce from her first husband, and in May of the same year she married her present husband, who was then or subsequently became an undischarged bankrupt. The applicant, no doubt, was unfortunate. In November, 1894, she again applied to the Court under the section to enable her to raise 1000*l.* to pay her debts and buy furniture for her permanent home, and was then relieved from the restraint on anticipation to the extent of 90*l.* a year. The result of these two applications is that her income has been reduced to about 830*l.* a year.

She now comes for the third time for the purpose of raising two sums, one of 600*l.* and the other 200*l.* It appears that, being in difficulties, she had had recourse to a money-lender to borrow 500*l.*, who, on discovering she was a married woman restrained from anticipation, declined to lend her the sum; whereupon she applied to her stepfather to become surety for her for the 500*l.*, which he did become, and the money was advanced. The sum so advanced was for the benefit of herself or her husband, or both. The money-lender obtained judgment against her stepfather for 500*l.* and interest, and put an execution into his rectory. The applicant's present solicitor then came forward and bought up the judgment debt. I say nothing reflecting on her solicitor, nor do I think it any disadvantage to the applicant that he is her solicitor on this application. Personally I feel sympathy for the applicant and her solicitor; but I cannot allow this to prevail, as I have to consider what is for the benefit of the married woman within s. 39 of the Act. No doubt it is honest that debts should be paid, but that is not a leading consideration in applications of this kind. I desire to state that as a rule I will not relieve married women from the restraint on anticipation in cases where they have had recourse to money-lenders. I will not allow the hand of the Court to be forced in this way. If I were to grant the present application,

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I should be establishing something like a precedent. I refused the application in chambers; and the result I have arrived at after hearing it in court is the same I came to there. No case has been established to justify me in exercising my discretion by acceding to the application.

There is a further point. A prosecution has been instituted against the applicant for stealing furniture, and it is asked that the restraint should be removed in order to enable her to raise 200*l.* for the purpose of defending herself. I had a similar case in principle before me in chambers a short time ago, where divorce proceedings had been instituted against the married woman who was desirous of defending herself against the imputation on her chastity. It was undoubtedly in that case for the benefit of the married woman to defend herself.

I will not now dispose of this part of the case finally, but will allow it to stand over, and in the event of her being committed for trial I will listen to an application in chambers, and will then consider it; but I must not be understood as saying that I will accede to it.

Solicitor: *Hood Barrs.*

G. M.

CHITTY J. 1896 *April* 15.

In re HARDY. HARDY *v.* FARMER.

[1893 H. 945.]

Bankruptcy—Secured Creditor—Composition—Default in Payment—Death of Debtor—Administration Action—Balance of Mortgage Debt—Claim by Mortgagees to Prove—Mode of Procedure—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 11; *s.* 108.

In 1889 A. mortgaged certain property to secure 2000*l.* and interest. Shortly afterwards a receiving order was made against A. on his own petition. In July, 1890, he made a composition with his creditors under s. 18 of the Bankruptcy Act, 1883, which was approved of by the Court, under which the creditors were to be paid by three instalments extending over a year.

The mortgagees neither attended the creditors' meeting nor assented to the scheme of composition.

Default was made in payment of the instalments. A. died two months

after the expiration of the year, and this action was commenced by a creditor for the administration of his estate, which proved to be insolvent.

The mortgagees valued their security at 1500*l.*, and claimed to be admitted as creditors in the action for 500*l.*, the balance of their debt. Their proof had been admitted by the trustee under the composition deed:—

Held, that the Court of Bankruptcy had jurisdiction to proceed in the bankruptcy of A. under s. 108 and s. 18, sub-s. 11, of the Bankruptcy Act, 1883, notwithstanding his death, and that the strict course would be to allow the applicants to take proceedings in that Court, but the plaintiff having submitted, in order to save delay and expense, to abide by the judgment of this Court on what would be the result of those proceedings, the claim was admitted.

SUMMONS by H. E. Thornton and another in a creditor's action instituted for the administration of the estate of a testator, Joseph Steere Hardy claiming to be creditors against the estate in respect of a sum of 500*l.*

The applicants were mortgagees of the testator under certain indentures of mortgage and transfer, dated respectively December 9, 1886, and May 30, 1889, for the sum of 2000*l.* and interest.

On May 6, 1890, a receiving order was made against the testator on his own petition. Shortly afterwards a scheme of arrangement under s. 18 of the Bankruptcy Act, 1883, was accepted and approved of by the creditors of the debtor, whereby he agreed to pay 20*s.* in the pound by three instalments at intervals of four months, the first instalment to be paid within four months from the date of the approval by the Court of the proposal.

By an order dated August 1, 1890, the Court being satisfied that the terms were reasonable, and being satisfied that the case was one in which the Court would not be required if the debtor were adjudged bankrupt to refuse an order of discharge, the scheme was approved, and it was ordered that the receiving order made against the debtor should be, and the same was, thereby rescinded.

The applicants had not attended the meeting of creditors when the scheme was approved, nor did they assent to it.

Default was made in payment of the instalments, and the debtor died on October 13, 1891. This action was instituted

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for the administration of his estate, when the usual order for accounts and inquiries was directed. The estate proved to be insolvent.

The applicants, having valued their security at 1500*l.*, carried in this claim for 500*l.*, being the balance of the sum of 2000*l.* after deducting the 1500*l.*

The claim came before the judge in chambers in May, 1895, when it was disallowed, but without prejudice to any application which might be made in bankruptcy. An application was accordingly made for an order declaring that a proof for 500*l.* ought to be allowed; and by an order in bankruptcy dated June 19, 1895, the Court, seeing no objection to the proof, but it appearing that the same had on June 10, 1895, been admitted to rank for dividend by the trustee under the scheme of arrangement, and the application then made not being by way of appeal from a decision of the trustee, the Court did not think fit to make any order upon the application, and the same was accordingly dismissed.

Thereupon this summons to vary the chief clerk's certificate by allowing the claim was taken out and adjourned into Court.

Byrne, *Q.C.*, and *R. J. Parker*, for the summons. The applicants were entitled to abstain from proving their debt or taking any part in the composition proceedings, and can now on realization of their security prove against the testator's estate for payment of the composition on the balance remaining unsatisfied of their debt: *In re Bestwick* (1); or instead of realizing they can put a value on their security, as they have done, and prove for the deficiency.

If the debtor were alive the applicants could apply to the Court of Bankruptcy under sub-s. 11 of s. 18 of the Bankruptcy Act, 1883, to make the debtor bankrupt and annul the composition; and s. 108 provides that if a debtor by or against whom a bankruptcy petition has been presented dies the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive. It has been held under that section that where a debtor has presented a petition and dies

(1) 2 Ch. D. 485.

before adjudication the Court will notwithstanding adjudicate him bankrupt: *Ex parte Sharp* (1); *In re Easy.* (2) That is a general enactment, and, taken together with sub-s. 11 of s. 18, shews that the Bankruptcy Court would allow the applicants to take further proceedings: that being so, there can be no reason why our claim should not be admitted in the action.

Farwell, Q.C., and *Solomon*, for the plaintiff. The case of *In re Bestwick* (3) has no application to the present case, as the decision in that case was under the Bankruptcy Act of 1869.

The debt is gone. By the Bankruptcy Rules of 1886, r. 211, where a composition has been sanctioned and default made, no action to enforce the payment lies, but the remedy of the person aggrieved is by application to the Court of Bankruptcy, and the payment can be enforced only under the provisions of sub-s. 11 of s. 18. The receiving order having been rescinded there is no pending petition, and it would not be possible to proceed under sub-s. 11, and a fresh petition would be necessary.

In any event the applicants, not having gone in under the composition and having allowed the debtor to incur fresh liabilities, have lost their priority, and cannot prove in competition with new creditors: *Troughton* v. *Gitley* (4); *Ex parte Allard* (5); *Tucker* v. *Hernaman* (6); *In re Smith.* (7)

Byrne, Q.C., in reply.

CHITTY J. The applicants are secured creditors of the deceased testator. They seek to prove against his estate for a sum of 500*l.*, being the deficiency in the value of their security. The executors, having regard to the 10th section of the Judicature Act, could, if they thought fit, redeem at the value that has been put on the security and have the benefit of the other provisions in the bankruptcy with regard to a secured creditor; but they are content to let the matter stand as it is, and the question raised is whether the applicants are entitled to prove for the deficiency of 500*l.*

The ground on which the Court is asked to reject the proof

(1) 34 W. R. 550.
(2) 19 Q. B. D. 538.
(3) 2 Ch. D. 485.
(4) Amb. 630.
(5) 16 Ch. D. 505.
(6) 4 D. M. & G. 395.
(7) 24 Ch. D. 672.

CHITTY J. 1896 *In re* HARDY. HARDY *v.* FARMER.

is that fourteen months before the testator's death, and after he had presented a petition in bankruptcy, a composition scheme was approved of by the Court of Bankruptcy, and thereupon the receiving order that had been made against the debtor was discharged. For the general body of the creditors it is urged that the provisions of the 18th section of the Bankruptcy Act, 1883, apply, and have this effect, namely, that by the 8th sub-section, the composition having been accepted and approved, as it was, it is binding on all the creditors so far as relates to any debts provable in bankruptcy. This 500*l.* would have been a debt provable in bankruptcy. And that the 11th sub-section provides in substance what is to happen in case default is made in payment of the composition.

Now, if the debtor had been alive it is quite plain that the applicants could apply to the Court of Bankruptcy under the 11th sub-section, the effect of which is that where there is a default in payment of any instalment due the Court has power in its discretion, on application by any creditor, to adjudge the debtor bankrupt, and then to annul the composition without prejudice to anything that has been done under it, and the sub-section ends with the enactment that where such adjudication takes place any debt provable in other respects which has been contracted before the date of the adjudication shall be provable in the bankruptcy—in other words, under the bankruptcy the subsequent creditors down to the date of the adjudication are admitted. If the debtor, therefore, had been alive, the applicants could have pursued the remedy given to them by the 11th sub-section. The plaintiff, again, in opposition to the claim, relies on rule 211 of the Bankruptcy Rules, 1886, which has the effect of a statute. The effect of that rule is that where a composition has been sanctioned, and default made either by the debtor or by the trustee, if any, no action to enforce the payment shall lie; but the remedy of any person aggrieved shall be by application to the Court. Putting the 211th rule by the side of s. 18, the result appears to be that a creditor who is barred by the composition, though he has not given any consent, cannot pursue any other remedy than that given by sub-section 11 of s. 18; so that if the debtor had been alive the

applicants could not have sued for the balance of their security supposing that they had realized it, and there was a deficiency which would have been an ordinary debt. The right, therefore, to sue for the debt or to enforce payment is that it can be enforced only under the provisions of the 11th sub-section.

For the applicants, however, s. 108 is relied on, which provides that "if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive." And under that section Cave J. and Grantham J., sitting as a Divisional Court, have held that where the petition is presented by the debtor himself the adjudication could be made, though after his death: *Ex parte Sharp.* (1) Of course, the section cannot be read as applying to a bankruptcy petition which has been dismissed, neither can it be applied to the case where the petition has been presented by a creditor but there has been no service during the debtor's lifetime: *In re Easy.* (2) Those decisions shew that the construction put upon the 108th section is a general one, and I am not able to find any ground upon which it would be reasonable, in my opinion, to say that the provisions of that section are not applicable to sub-s. 11 of s. 18. To put a case which was adduced by Mr. Byrne, the Legislature never could have intended that if there had been an order approving a composition and the debtor had died the next day the creditors who had not assented to the composition, but who were bound by it, could be told by the executors of the deceased that what had happened amounted to a complete discharge, and that there were no available means whatever open to them to obtain payment of that which had been promised under the composition. I think this is a case of the nature I have just described with this difference—that instead of dying the day after the composition, the debtor here lived till the end of the period of twelve months, and then died two months afterwards; and I think, following the principle on which the Divisional Court acted, there would be jurisdiction in the Court of Bankruptcy to proceed under the 108th section, as there are no circumstances

(1) 34 W. R. 550. (2) 19 Q. B. D. 538.

CHITTY J. 1896 *In re* HARDY. HARDY *v.* FARMER.

in that case to make it unjust for the Court to order otherwise—that is, to stop the bankruptcy proceedings.

Then it was said for the plaintiff that there was no pending petition here, and that, the receiving order having been rescinded, it would be impossible to apply the 11th sub-section. Again, dealing with the case as if the debtor were alive, it appears to me that that observation is not justified: that there is a petition on the file at the present moment is not denied.

It was also suggested that the language of the 11th sub-section, namely, "on application by any creditor," required a new petition. In my opinion, it is quite plain that any creditor who has a ground of complaint by reason of default in payment of the composition could make the application in the Bankruptcy Court without presenting any fresh petition.

This brings me to the conclusion that the Bankruptcy Court would apply its powers and exercise its jurisdiction in favour of the applicants.

The matter came before me in chambers, and the technical objection that the applicants had no right of action either at common law or in equity was pressed, and I gave leave to the applicants to make any application they might think fit to the Bankruptcy Court. An application was accordingly made for an order declaring that the applicants were entitled to prove against the estate of the debtor for the 500*l*. But it appeared that the trustee of the composition deed had allowed the proof at the sum of 500*l*.; and consequently the Court found that it was quite unnecessary to decide as upon an appeal from the trustee who had already admitted the claim, and accordingly the order shewed on the face of it that the trustee appeared and did not oppose the application, and made no order on the application, the result being that the applicants were admitted as creditors for 500*l*.

It appears to me that thus far the strict course would be to allow the applicants to take further proceedings in Bankruptcy, with the view of obtaining an adjudication or some other order, and I put it to counsel who opposed the claim whether they desired that that course should be adopted; but they, desiring to save delay and expense and to divide the estate, would not

ask that that should be done, but were content to take my opinion as to what would be the result of the application to the Court of Bankruptcy; so that circuity of action, which ought always to be avoided where it is possible, will not take place. I think, therefore, that I ought to accede to the application and admit the claim.

In addition to the arguments I have gone through, many other points were raised against the claim, which I propose to dispose of in a few words. A great point was made of *Troughton* v. *Gitley* (1), and the subsequent authorities that proceeded on the authority of that decision of Lord Camden; and it was said as against the applicants that they had stood by and allowed the debtor to go on incurring debts under such circumstances as would justify the Court in saying that the applicants who did not take the trouble to prove under the composition were to be postponed to subsequent creditors. It will be sufficient for me to say that the circumstances of the case do not give rise to any ground for applying the equitable rule of Lord Camden as against the applicants.

Solicitors: *Geare, Son & Pease, for Martin & Sons, Nottingham; Kingdon, Wilson & Webb, for Frankish, Kingdon & Wilson, Hull.*

(1) Amb. 630.

G. M.

NORTH J.
1896
March 14.

In re CHARRIERE.
DURET *v.* CHARRIERE.

[1894 C. 1491.]

Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29), *ss.* 2, 4—*Widow's Charge—Dower.*

Dower out of real estate of an intestate is subject to abatement in respect of the widow's charge of 500*l.* imposed on the intestate's estate by the Intestates' Estates Act, 1890.

THIS was the further consideration of an action for partial administration of the estate of an intestate who had left a widow, but no children.

The plaintiffs were the next of kin, the defendants the widow and heir-at-law of the intestate.

The intestate died possessed of personal estate of more value than 500*l.*, and of real estate in respect of which the widow was entitled to dower. The widow had retained out of the personal estate the whole of the 500*l.* charged in her favour by the 2nd section of the Intestates' Estates Act, 1890.

A question raised on further consideration was whether the widow's dower was subject to a proportional part of the charge of 500*l.*

Rawlins, Q.C., and *Brabant*, for the plaintiffs, and *Redman*, for the heir. The second section of the Act charges the 500*l.* on the whole of both the real and personal estate, and by the third the charge is to be borne and paid by the personal estate and the real estate in proportion to their values. There is no deduction in respect of dower from the value of the real estate for this purpose; and by the 4th section it is made clear that the widow's interests are what they would have been if the proportional parts of the real and personal estate necessary to raise the 500*l.* had been taken away in the intestate's lifetime, and this Act had not been passed.

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the widow. The widow's dower cannot be properly called the intestate's

real estate; it is a charge on the real estate which is to be allowed for in estimating the value of the real estate within the meaning of s. 5. If there was any deduction from the full amount of dower she would have been entitled to if this Act had not been passed, this provision would not be in addition to and without prejudice to her interest in real estate, within the meaning of s. 4.

NORTH J. I cannot think there is any difficulty in seeing how the charge of 500*l.* is to be borne. If the 4th section had not been in the Act there might have been. I am of opinion that the charge of 500*l.* comes before the widow's right to dower. It is said that what the widow takes under the Act, if such is the construction, is not 500*l.*, but 500*l.* less a proportion of the interest she had independently of the Act. I do not think the Act is splitting hairs in that way. The widow takes the 500*l.* out and out, paramount to everything. After that is deducted proportionately from all the estate there is a residue which is just the same as if the 500*l.* had not been part of the estate. She cannot have that 500*l.* taken away from the estate proportionately without being somewhat worse off in respect of the other interests she has under the intestacy.

I will make a declaration to the effect that the widow's dower is subject to the charge of 500*l.*; and give liberty to apply to raise the proper proportion of this 500*l.* by sale or mortgage of the real estate.

Solicitors: *F A. Brabant; White & De Buriatte.*

D. P.

NORTH J.
1896
March 25, 26.

In re WEBBER.
GRIBBLE *v.* WEBBER.

[1895 W. 3866.]

Revenue—Estate Duty—Settled Estate Duty—Incidence—Apportionment between Settled Property and Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 5, 6, 8, 9, 14, 22.

When pecuniary legacies or shares of the residue of a testator's personal estate are settled by his will, no part of either the estate duty or the settlement estate duty imposed by the Finance Act, 1894, is to be borne by the settled legacies or shares, but the whole of those duties must be borne by the general residue.

SUMMONS by the executors and trustees of the will of Thomas Webber, as plaintiffs, against Matilda Ann Webber, widow, Emily Leach Kersley, widow, and Charles Frederick Webber, a residuary legatee under the will, as defendants, for the determination of the following questions: (1.) whether (*a*) the estate duty and (*b*) the settlement estate duty, payable in respect of two legacies of 2000*l.* and 800*l.*, respectively settled by the will on trusts in favour of Mrs. Webber and Mrs. Kersley (a daughter-in-law and a daughter of the testator) and their respective children, ought to be paid out of those legacies respectively or out of the testator's residuary estate; (2.) Whether (*a*) the estate duty and (*b*) the settlement estate duty payable in respect of those shares of the testator's residuary estate which were settled within the meaning of the Finance Act, 1894, ought to be paid out of the whole residuary estate or out of those settled shares respectively.

The testator died on March 7, 1895. By his will, dated February 27, 1890, the testator devised all his real estate specifically. He also bequeathed the sum of 2000*l.* (free of legacy duty) unto his executors, upon trust to invest the same as therein mentioned, and to pay the income thereof to Matilda Ann Webber during her life for her separate use: and from and after her death the trustees were to stand possessed of the 2000*l.* and the investments representing the same and the income thereof upon trust

for the children of Matilda Ann Webber as therein mentioned. The testator also bequeathed the sum of 800*l.* (free of legacy duty) to his executors upon similar trusts in favour of Mrs. Kersley and her children. And the testator devised and bequeathed the residue of his real and personal estate to his executors upon trust for sale and conversion, and out of the proceeds thereof to pay his funeral and testamentary expenses, debts and pecuniary legacies: and directed that the residue should be considered as divided into thirty shares. Some of these shares were settled by the testator, and others were given absolutely. The testator had no real estate but that which he devised specifically. (1)

(1) The following are the material sections of the Finance Act, 1894:—

Sect. 1: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say (inter alia):

"(*a.*) Property of which the deceased was at the time of his death competent to dispose."

Sect. 4: "For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof."

Sect. 5: "(1.) Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a.*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b.*) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

Sect. 6: "(2.) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other

NORTH J. 1896 *In re* WEBBER. GRIBBLE *v.* WEBBER.

A. Adams, for the plaintiffs.

J. G. Butcher, for the persons interested in the legacy of 800*l*. Both the estate duty and the settlement estate duty ought to

property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

"(3.) Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists, but he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable, and any further duty payable by reason thereof, for which he is or may be liable in respect of the other property mentioned in the affidavit.

"(4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow."

Sect. 8: "(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

"(4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Sect. 9: "(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

"(4.) If the rateable part of the

be borne by the residuary personal estate in the same way as probate duty was formerly borne. The Act has cast on the executors the duty of paying these duties, and has made no provision for their being paid out of or charged on any particular part of the testator's estate. The Act has drawn a distinction between the duty in respect of property passing to the executor as such, and the duty upon other property which he may pay, such as real estate.

[NORTH J. I wish to hear you only on the question how the settlement estate duty is to be borne.]

There is no distinction for this purpose between estate duty and settlement estate duty, which indeed is called in s. 5 "a further estate duty."

Archibald Read, for the persons interested in the 2000*l.* legacy and in the settled shares of residue. The settlement estate duty stands on the same footing as the estate duty. Sect. 8, sub-s. 3, applies to it just as it does to estate duty, and the executor is accountable for it to the Inland Revenue. It is one of the expenses of administration, and it must be paid before the estate is divided among the beneficiaries. Sub-s. 4

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estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned."

Sect. 14: "(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

Sect. 22: "(1.) In this part of this Act, unless the context otherwise requires:—

"(*e.*) The expression 'estate duty' means estate duty under this Act:"

"(*h.*) The expression 'settled property' means property comprised in a settlement":

"(*i.*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust."

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of s. 8 does not apply to the present case; it applies only where the executor is not accountable for the duty. The executor is not entitled to recover any duty which he pays except where the Act expressly provides that he shall be entitled to do so. The Act contains no separate definition of "settlement estate duty"; it is merely a further or additional "estate duty," and, like the estate duty, it must be paid out of the residue. In *In re Countess of Orford* (1) it was held that estate duty was to be apportioned between specific and residuary appointees, because the sum specifically appointed was a charge within the meaning of s. 14, sub-s. 1. That decision does not apply here. The settlement estate duty is not a substitute for legacy duty, and the direction in the will that the settled legacies are to be paid free of legacy duty does not apply.

Austen-Cartmell, for the persons interested in the unsettled residue. A proportionate part of the estate duty ought to be borne by the settled legacies and shares of residue. In *In re Culverhouse* (2) Kekewich J. held that estate duty on leaseholds specifically bequeathed was payable out of the testator's general personal estate, and it is not easy to distinguish that case from the present. But, independently of that decision, it is submitted that there is an analogy between the estate duty and the old probate duty, and that the principles laid down in *In re Croft* (3) and in *In re Shaw* (4) apply, and not the principle of *In re Bourne*. (5) It does not follow that, because the Act contains no provision that in a particular case the executor shall be entitled to recover a proportional part of the duty which he has to pay in the first instance, therefore he is not entitled to do so on general principles. The old account stamp duty is repealed, and the estate duties are substituted. When the Act says nothing about the apportionment of duty, the principle of *In re Croft* (3) and *In re Shaw* (4) applies. An executor has now to pay estate duty in respect of a large amount of property for which he was not formerly accountable, such as foreign and colonial property, and property over which the

(1) Ante, p. 257.
(2) W. N. (1896) 37 (14).
(3) [1892] 1 Ch. 652.
(4) [1895] 1 Ch. 343.
(5) [1893] 1 Ch. 188.

deceased had a general power of appointment which he had not exercised. Sect. 8, sub-s. 3, must be read in connection with s. 6, sub-s. 2. Sub-s. 4 of s. 9 is of much more extensive application than sub-s. 1, and the rateable part mentioned in sub-s. 4 is not limited by sub-s. 1. Sub-s. 4 applies to such a case as the present, and shews that the duty ought to be apportioned between the settled legacies and shares of residue and the general residue.

In the case of settlement estate duty it is still clearer that the duty ought to be borne by the beneficial interests, and not by the residue. This duty is not a mere addition to the estate duty; it is imposed on the settled property because it is settled, and the burden ought not to be imposed on the residue. The executor does not pay the settlement estate duty in the character of executor. Indeed, when he pays the estate duty as provided by s. 6, sub-s. 2, he would not know the value of a settled share of residue. Sub-s. 4 of s. 6, not sub-s. 2, applies to settlement estate duty. The accountability of the executor is limited to duty which he has to pay on delivering the Inland Revenue affidavit, and this does not apply to settlement estate duty. Consequently, if the executor pays that duty, he is entitled to be recouped out of the settled property.

NORTH J. The testator, who made his will before, but died after, the commencement of the Finance Act, 1894, gave two legacies of 2000*l.* and 800*l.* to be respectively settled on one of his daughters, and the widow of one of his sons, and their respective children, and he directed the residue of his estate to be divided into thirty shares, some of which he gave absolutely and others he settled. The question which I have to decide relates to the incidence of the estate duty and the settlement estate duty imposed by the Act—whether, as regards the settled legacies and the settled shares, a proportionate part of those duties or either of them are or is to be borne by the settled legacies or shares, or by the general residue of the estate. As regards the shares of residue, whether they are settled or given absolutely, it seems to me clear that the estate duty must be borne by the general residue, and this has been practically admitted in the

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course of the argument. As regards the settled legacies of 2000*l.* and 800*l.*, they would before the Finance Act have been liable to a duty of 1 per cent., from the payment of which they now under that Act escape. The testator has said that these legacies are to be paid free of legacy duty. That direction has no application now, but it shews what his intention was. The estate duty is imposed on the estate of the person who has died, and in the present case it seems to me that the executor has to pay it, and, when he has paid it, I cannot see anything in the Act which enables him in any way to recoup himself.

The settlement estate duty depends on somewhat different considerations. First of all, by s. 1 of the Act the estate duty is imposed on all the property, real or personal, settled or not settled, which passes on the death. In the present case the residue consists entirely of personal estate, for all the testator's real estate was specifically devised. Then s. 2 defines the "property passing on the death of the deceased" as including (amongst other things) "property of which the deceased was at the time of his death competent to dispose." All the property of this testator was property of which he was at the time of his death competent to dispose. Sect. 4 aggregates into one estate for the purpose of determining the rate of estate duty all the property passing on the death of the deceased on which that duty is leviable. Then by s. 6, sub-s. 2, the executor "shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit," and it is further provided that the executor "may pay" the estate duty in respect of any other property passing on the death "which by virtue of any testamentary disposition of the deceased is under the control of the executor" (this would apply, for instance, to real estate devised to the executor), and the executor may pay the estate duty in respect of other property which is not under his control if he is requested to do so by the persons accountable for the duty. The executor, therefore, is bound to pay a part of the duty; another part he may pay without any request; and a third part he may pay, if he is requested to do so by the persons accountable. Then sub-s. 3

provides for the case in which the executor does not know the amount or value of any property which has passed on the death. The Act does not ignore the difficulty of determining the amount of the duty to be paid when it is doubtful of what the estate consists. Sub-s. 4 provides for the payment of estate duty "so far as not paid by the executor." I take that to mean that part of the estate duty which the executor does not pay, but for the payment of which some other person is accountable. By s. 8, sub-s. 3, the executor is to specify in appropriate accounts "all the property in respect of which estate duty is payable upon the death of the deceased," i.e., whether the property is under his control or not; but he is made accountable only for the estate duty "in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death," and then only to the extent of the assets. The executor is to specify all the property to the best of his power, but he is made accountable for the duty in respect only of property which comes to him as executor. Sub-s. 4 makes further provision for the case where some person other than the executor is accountable for the estate duty. Now I turn back to s. 5, which imposes "a further estate duty (called settlement estate duty)" on (inter alia) "property settled by the will of the deceased." The legacies of 2000*l.* and 800*l.* and also some shares of the residue are settled by the will of the deceased, and therefore settlement estate duty is payable in respect of them. In the present case the executor is the person who is bound to pay the estate duty, and it seems to me that for the purposes of the Act the provision for payment of the settlement estate duty is covered by the provision for payment of the estate duty. If it is not, I cannot find in the Act any provision that the settlement estate duty is to be paid by any person whatever. There are, no doubt, some cases in which, as is shewn by s. 8, sub-s. 3, the estate duty is payable by some person other than the executor; but in the present case the executors are clearly accountable for the estate duty as regards the settled legacies and shares of residue: and in my opinion the executor is equally accountable for the settlement estate duty. By s. 22 the term "estate duty" is defined as meaning "estate duty under this

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Act." There is no separate definition of "settlement estate duty." This definition seems at first sight absurd; but it appears that the term "estate duty" is used in some previous Acts, and but for this definition the term "estate duty" in the Finance Act might have applied to the estate duty under those prior Acts. It appears to me that the settlement estate duty is a part of the burden which is thrown upon the executor in respect of the whole residue of the personal estate, and that he is the person who is bound to pay it in the first instance. When, therefore, he has paid it, is there any provision in the Act which enables him to repay it out of, or to charge it upon, any particular part or share of the estate, or to get back in any way what he has paid? No such provision has been pointed out to me. Two sections have been referred to. The first is s. 9, which provides by sub-s. 1 that "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which such duty is leviable." That refers only to the duty payable on that part of the property which does not pass to the executor as such. Then by sub-s. 4, "If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property." But the "rateable part" there mentioned must, in my opinion, be the same "rateable part" which is mentioned in sub-s. 1, i.e., the rateable part of the duty payable in respect of that property which does not pass to the executor as such; and it has no application to property which does pass to him as executor.

Again, s. 14, sub-s. 1, which was also referred to, deals only with property which does not pass to the executor as such, and does not touch the present case. In my opinion the settlement estate duty is thrown upon and has to be borne by the executor, and no means are provided by the Act by which he can recover it from, or throw it upon, any other person.

It has been urged that it is unfair that a duty which is imposed by reason of a part of the estate being settled should be borne by the whole estate. This, however, is an argument

which should have been or should be addressed to the Legislature; my duty is only to construe the Act as it stands. In my opinion the plaintiffs are not entitled to repayment out of the settled property of the settlement estate duty which they have paid out of the general residue of the estate. The testator might have thrown the whole burthen of the settlement estate duty on the settled estate; but he has not thought fit to do so.

Solicitors: *Surr, Gribble & Co.; Carr & Son.*

W. L. C.

In re COOK'S MORTGAGE. LAWLEDGE *v.* TYNDALL.

[1895 C. 2496.]

Improvements—Tenant in Common—Mortgage—Sale.

The present value of improvements due to expenditure by a tenant in common in fee of one half, and tenant for life of the other half, of real estate (not exceeding the expenditure) allowed in distributing the surplus proceeds of sale by a paramount mortgagee among the persons entitled to the equity of redemption.

UNDER an indenture dated May 3, 1878, a piece of land and houses at Balsall Heath, King's Norton, Worcestershire (subject to a mortgage for 300*l.* vested in C. C. Cope and E. M. Lawledge), were vested as to one undivided moiety in Rebecca Cook in fee, and as to the other undivided moiety in trustees, upon trust to pay the income to Rebecca Cook for life, and after her death to pay the income to Rebecca Payne (then Rebecca Nicholls) for life, and after the death of Rebecca Cook and Rebecca Payne upon trust for all the children of Rebecca Payne who should attain twenty-one years of age, as tenants in common; and in default of such children on certain other trusts.

In September, 1883, Rebecca Cook and Rebecca Payne (then Rebecca Nicholls) mortgaged their interests in the premises to C. C. Cope and E. M. Lawledge, to secure a sum of 700*l.* advanced by them to Rebecca Cook. The 700*l.* so advanced

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was expended by Rebecca Cook in converting the houses at Balsall Heath into shops.

In December, 1883, Rebecca Nicholls married John Payne. In December, 1888, Rebecca Cook died intestate, leaving her sister Sarah Ann Morse (who afterwards died intestate) her heiress-at-law.

E. M. Lawledge survived C. C. Cope, and in exercise of a power of sale contained in the overriding mortgage for 300*l.* sold the premises in October, 1894, for 2030*l.*

This was an originating summons taken out by E. M. Lawledge to determine how the balance of the purchase-money in his hands, after deducting duty paid by him in respect of successions on the death of Rebecca Cook and Sarah Ann Morse, the costs, and the amount due to him as mortgagee, was divisible.

The defendants were the trustees of the indenture of May, 1878, Rebecca Payne, and the widower and child of Sarah Ann Morse.

Briscoe, for the plaintiff.

Yate Lee, for the trustees of the indenture of 1878, and Rebecca Payne. It must be admitted that the property is of greater value by reason of the expenditure by Rebecca Cook of the 700*l.*; but the Court has no jurisdiction, except in case of sale in a partition action, to deduct anything in respect of such improvement from the share of a tenant in common who may have obtained the benefit of such expenditure: *Leigh* v. *Dickeson* (1); *In re Jones*. (2)

C. E. E. Jenkins, for the widower and child of Sarah Ann Morse. There can be no difference in principle between the division of purchase-money arising from the sale of property belonging to tenants in common in a partition action, and the division of the balance of purchase-money of property sold by a mortgagee, when the equity of redemption belongs to tenants in common. The other facts here are similar to the facts of *In re Jones*. (2)

A certain amount of the benefit of the expenditure may have

(1) 15 Q. B. D. 60. (2) [1893] 2 Ch. 461, 476.

been worn out, and the tenant for life has had the benefit of that. What we claim is an allowance of half the present value of the improvement not exceeding the amount actually expended.

NORTH J. I have now to make a partition of the surplus of the proceeds of sale: and in my opinion the principle of the decision of *In re Jones* (1) applies to this case. The share of the purchase-money now distributable to be received by those now entitled to Rebecca Cook's moiety will be one-half, and also such further sum as represents one-half of the present value of the improvement, but so that such further sum is not in any case to be more than one moiety of 700*l*.

Solicitors for plaintiff: *Shaen, Roscoe, Massey & Co.*

Solicitors for defendants: *Royle & Co., for Tyndall & Co., Birmingham.*

P. D.

In re WATSON. TURNER *v.* WATSON.

[1895 W. 1073.]

Executor—Retainer—Debt due from Bankrupt Legatee.

A surety for a mortgagor bequeathed to him a share of the residue of his estate, subject to the life interest of the testator's widow. After the death of the testator the mortgagor became bankrupt. He never obtained a discharge, and the bankruptcy was never closed. Neither the mortgagees nor the testator's executors proved in the bankruptcy. After the bankruptcy the executors made some payments to the mortgagees in pursuance of the testator's liability under his contract of suretyship:—

Held, that, on the death of the tenant for life, the executors were entitled, notwithstanding the bankruptcy, to retain out of the mortgagor's share of the residue the amount of the payments which they had thus made to the mortgagees, with interest thereon at 4 per cent.

SUMMONS by W. C. Turner, who was the executor of the surviving executor and trustee of the will of Thomas James Watson, as plaintiff, against persons beneficially entitled to the

(1) [1893] 2 Ch. 461, 476.

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residuary estate of the testator, as defendants, asking for the determination (inter alia) of the following question: Whether the plaintiff, as trustee of the residuary estate of the testator, was at liberty to retain out of the share of J. J. W. Watson, deceased (a son of the testator), in the testator's residuary estate all or any of certain sums which represented payments made and loss incurred by reason of the testator's liability, as surety for a debt of J. J. W. Watson, under a deed of mortgage and covenant dated August 29, 1854.

The sums in question were stated to be—

(*a.*) Payments made by persons beneficially interested in the residuary estate in respect of interest payable under the mortgage deed.

(*b.*) Payments made out of the testator's estate, and out of the proceeds of a reversionary interest belonging to him, which was included in the mortgage, in respect of the principal debt and interest thereby secured, with interest at the rate of 5 per cent. on the amount of the principal debt from the date of payment.

(*c.*) Consequential damage arising from the sale of the reversionary interest by the mortgagees under the powers conferred by the mortgage; as to which a further question arose how the same was to be computed.

By the deed of August 29, 1854, the testator assigned to J. E. Clowes and T. G. Kensit a reversionary interest in one-seventh part of the sum of 7333*l.* 6*s.* 8*d.* Consols (to which he was, under the will of his father, entitled, expectant on the death of his mother, Susannah Watson), by way of further security for the sum of 500*l.*, which was advanced by Clowes and Kensit to the testator's son, J. J. W. Watson, with interest on the 500*l.* The son by this deed assigned to Clowes and Kensit a policy of insurance for 500*l.* on his own life as security for the advance of 500*l.*, and he covenanted with the lenders to pay the 500*l.* with interest thereon at 5 per cent. And the testator and his son covenanted with the mortgagees to pay interest at 5 per cent. on the 500*l.*, and also the annual premiums on the policy. The deed conferred on the mortgagees a power of sale.

By his will dated December 3, 1857, T. J. Watson appointed

his wife Caroline Watson, John Evans, and W. H. Turner executrix and executors thereof: and he gave his residuary estate to John Evans and W. H. Turner, upon trust to pay the income thereof to his wife during her life or widowhood, and upon her death or marriage to divide the trust estate between his children, Mrs. White, James H. Watson, J. J. W. Watson, and Musgrave Watson, in the proportions of one-third to Mrs. White, and two-thirds to be equally divided between the three sons.

The testator died on December 3, 1857. His wife, his daughter, and his three sons survived him.

In June, 1859, J. J. W. Watson was adjudicated a bankrupt. Two dividends, amounting to 5*d.* in the pound, were paid in the bankruptcy. The bankruptcy was never closed, nor did the bankrupt obtain a certificate under the Bankruptcy Act of 1849, or an order of discharge under the Bankruptcy Act of 1861. The bankrupt's reversionary interest under his father's will was never realized by the assignees in the bankruptcy, because (as will appear) the father's executors claimed that the bankrupt was indebted to the father's estate in respect of his suretyship for the bankrupt under the deed of August 29, 1854. Neither the mortgagees nor the father's executors proved in the bankruptcy in respect of this debt.

After the bankruptcy the interest payable under the mortgage of August 29, 1854, fell into arrear, and the mortgagees gave notice to the testator's executors that they intended to sell the testator's reversionary interest. In order to prevent the threatened sale the interest due under the mortgage was from time to time paid by the testator's executors and some of the beneficiaries under his will. For this purpose 40*l.* 12*s.* 7*d.* was contributed by the testator's widow, 40*l.* 10*s.* 8*d.* by Mrs. White, 40*l.* 10*s.* 8*d.* by J. H. Watson, and 122*l.* 10*s.* 2*d.* by the testator's executors.

Ultimately in 1869 the mortgagees sold the testator's reversionary interest for 690*l.* Out of this sum they paid 6*l.* 18*s.* for succession duty, 29*l.* 10*s.* for auctioneer's charges, 23*l.* 14*s.* 10*d.* for costs of sale, and they retained 525*l.* 4*s.* 8*d.* for principal and interest, and on February 9, 1870, they handed over the balance,

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namely, 104*l.* 12*s.* 6*d.*, to the testator's executors, who added it to the testator's residuary estate then in their hands.

In 1871 Susannah Watson, the testator's mother, died, and his reversionary interest under his father's will thereupon fell into possession and became part of the testator's estate, to the income of which his widow was entitled for her life.

On February 5, 1886, the bankrupt, J. J. W. Watson, died. He left no property, except his interest under the testator's will, and no representation was taken out to him.

On August 29, 1894, Caroline Watson, the testator's widow, died, and thereupon the residue of his estate became divisible among his children or their representatives, according to the provisions of his will.

The plaintiff, as legal personal representative of the last surviving trustee of the testator's will, distributed the residue accordingly, with the exception of the sum of 1157*l.* 12*s.* 3*d.*, which represented the share of the bankrupt. The object of the present summons was to obtain the direction of the Court as to the manner in which this sum ought to be dealt with.

Swinfen Eady, Q.C., and *W. E. Mozley*, for the plaintiff, stated the facts.

Vernon Smith, Q.C., and *G. Cave*, for J. H. Watson and the representatives of Mrs. White. The bankruptcy of J. J. W. Watson, as it happened after the death of the testator, cannot affect the executor's right to retain out of the bankrupt's share of the residue the debt due from him to the testator's estate. In *Cherry* v. *Boultbee* (1) the bankruptcy was before the death of the testator. The bankrupt's assignees are subject to all equities: *Jeffs* v. *Wood*. (2) The bankrupt cannot have any share of the residue without accounting for the 122*l.* 10*s.* which the executors paid for interest and premiums. And the payments which the other residuary legatees made for the same purpose stand on the same footing. It must be assumed that those payments were made at the request of the executors. At any rate, the payments were made by persons whose interest in the estate was similar to that of the bankrupt, and the payments

(1) 4 My. & Cr. 442. (2) 2 P. Wms. 128.

should be treated as made out of the estate. They were made in order to prevent a sale of the testator's reversionary interest. It was the interest of all the residuary legatees to do that. The payment of the 122*l.* 10*s.* was made by the testator's estate in pursuance of his covenant as surety for the son, and the son was bound to indemnify the testator and his estate against all loss arising from the contract of suretyship. There is the same right of indemnity with regard to the 578*l.* which the mortgagees retained out of the proceeds of sale. That was in substance a payment by the testator's estate: *In re Akerman.* (1) Interest should be charged at 5 per cent.: *Petre* v. *Duncombe.* (2) The debt for which the testator was surety carried interest at 5 per cent.

R. J. Parker, for Musgrave Watson.

Christopher James, for the assignees in bankruptcy of J. J. W. Watson.

[He was stopped by the Court as to the payments made by the beneficiaries.]

The principle of retainer by the executor does not apply. There are no doubt cases in which an executor is entitled to pay out of funds in his hands belonging to a legatee a debt due from the legatee to the estate. But to found that right there must be a fund in existence out of which a subsisting debt can be paid. Here at the time of the death of the testator the bankrupt was only under a contingent liability to make some payment to the testator's estate at some future time. By the bankruptcy this liability was converted into a right of proof in the bankruptcy. There never was a subsisting debt until after the bankruptcy: *Cherry* v. *Boultbee* (3); *Courtenay* v. *Williams* (4); *In re Taylor.* (5) The legacy did not become payable till after the bankruptcy. There never was before the bankruptcy a time at which the executors had in hand a fund payable to the person who was liable to pay the debt. The liability to pay the debt and the right to receive the money had never been vested in the same person. By reason of the

(1) [1891] 3 Ch. 212.
(2) 20 L. J. (Q.B.) 242.
(3) 4 My. & Cr. 442.
(4) 3 Hare, 539.
(5) [1894] 1 Ch. 671.

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bankruptcy the assignees have a higher right than the bankrupt himself. An executor cannot retain a debt out of a specific legacy. This shews that there is no lien or charge. There must co-exist in one person a present liability to pay and a right to receive. A future debt cannot be retained or set off: *Re Rees*. (1) Even if there is a right to retain the principal, there is no implied contract to pay interest. At any rate, the interest should not exceed 4 per cent.

Vernon Smith, Q.C., in reply. The assignee in bankruptcy stands in the same position as the legatee himself: *Bousfield* v. *Lawford*. (2) The liability to pay existed at the date of the bankruptcy; it makes no difference that it was not ascertained until afterwards. In *Re Rees* (1) the debt had not been ascertained when the legacy became payable; in the present case it had.

[NORTH J. referred to *In re Hodgson* (3); *In re Orpen*. (4)]

In *In re Hodgson* (3) the bankruptcy was before the death of the testatrix, and in *In re Orpen* (4) the composition was before the death of the testator. In both those cases *Cherry* v. *Boultbee* (5) was followed. It is against conscience that a legatee, or any one who claims through him, should take anything out of the estate until he has made good what he owes to it: *Courtenay* v. *Williams*. (6) In *Willes* v. *Greenhill* (7) a residuary legatee for whom the testator was surety mortgaged his share, and after he had done so a subsequent liability on the contract of suretyship was paid out of the estate, and it was held that the executors were entitled to retain the amount thus paid in priority to the mortgagee.

March 31. NORTH J., after stating the facts, continued:— The persons beneficially entitled under the testator's will say that the executor is bound to retain first, out of the bankrupt's two-ninths, the amount due from him to the estate; and that then the balance only would represent the bankrupt's share of the estate, which, of course, would be payable to the assignees

(1) 60 L. T. (N.S.) 260.
(2) 1 D. J. & S. 459, 464.
(3) 9 Ch. D. 673.
(4) 16 Ch. D. 202.
(5) 4 My. & Cr. 442.
(6) 3 Hare, 539, 554.
(7) 29 Beav. 376.

in the bankruptcy. If the son were alive, and not a bankrupt, this would be quite clear. *Willes* v. *Greenhill* (1), and *In re Akerman* (2) shew that, under those circumstances, the executor would be entitled to retain the son's debt, treating it as being so much in his hands on account of his share of the estate. *Courtenay* v. *Williams* (3) and *In re Akerman* (2) also shew that the lapse of time since the son's bankruptcy in 1859, or since the realization of the security in 1869, in each case upwards of twenty years, would not affect the executor's right to retain. But, there having been a bankruptcy, the question is, What is the position of the assignees? I take it that the assignees stand in no better position than the son himself would if he were alive and not a bankrupt. I will refer to two authorities bearing on this point. The first is *Bousfield* v. *Lawford*. (4) There a testator bequeathed his residuary personal estate to his daughter. The daughter survived him several years, and bequeathed her residuary estate to her six children. One of her sons, who owed the testator 1400*l*., became bankrupt some time after her death. It had been ascertained before the bankruptcy that the testator's estate yielded a clear residue, exclusive of the 1400*l*.: and it was held that the executors of the daughter were entitled to retain the 1400*l*. out of the son's share in his mother's estate. There were two questions there: first, whether there was not a right to retain by virtue of an agreement for compromise and an order of the Court confirming it; and secondly, whether there was a right to retain independently of that agreement. Knight Bruce L.J. said (5): "Independently of the agreement and order, and on the assumption that the agreement and order ought to be viewed and treated as Mr. Hobhouse and Mr. Swanston say they ought, I am of opinion that the claim of the assignees is groundless. The other facts stated in the special case appear to me to establish the proposition that the testatrix had become in her lifetime the owner in equity of the debt in question for her own use. It was due from one of her residuary legatees, who has

(1) 29 Beav. 376.
(2) [1891] 3 Ch. 212.
(3) 3 Hare, 539.
(4) 1 D. J. & S. 459.
(5) 1 D. J. & S. 463.

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since her death become bankrupt, and he now by his assignees (who can claim by no better title than he, if not bankrupt, could have done) seeks to retain that portion of the assets, and receive the same share of the residue as if no debt had been owing from him. I am of opinion that there is no principle nor authority for such a contention." Turner L.J. took the same view.

The other case is *In re Batchelor* (1), which was heard by Lord Selborne, then sitting for the Master of the Rolls. There the question arose in this way: A married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to L. for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57. On the reversion falling in, the executors of the testator claimed to be entitled to retain the amount of the debt out of the legacy. It was held that there was no right of retainer, and that the assignee must be paid in full. That is, by virtue of the assignment by the husband and wife of the wife's legacy, all the interest of the husband had gone, and the legacy could not be impounded to pay the husband's debt. The case itself is not much in point; but the following observations were made by Lord Selborne (2): "As long as the fund is reversionary, the conditions necessary for the application of the legacy towards payment of the husband's debt to the testator (whether the term 'set-off' or the term 'retainer' ought to be used) do not exist. Nevertheless, I take it to be clear law, that the assignee of a contingent or reversionary legacy would, when the legacy became payable, be subject to this right, if the legatee would himself have been subject to it, in the absence of any assignment."

Cherry v. *Boultbee* (3) and *In re Hodgson* (4) were cited as authorities to the contrary; but in each of those cases the bankruptcy took place during the lifetime of the testator; and the ground of the decision was, that the executors were never entitled to the debt, but only to a dividend upon it. That

(1) L. R. 16 Eq. 481.
(2) Ibid. 483.
(3) 4 My. & Cr. 442.
(4) 9 Ch. D. 673.

entirely distinguishes those cases from the present case. In the present case no one ever proved against the bankrupt's estate in respect of this debt. The father's executors had, no doubt, a claim against the bankrupt's estate; but they were not in a position to prove. The only persons who could prove were the principal creditors, the mortgagees, and they never did prove; the executors could not have proved until, in 1869, the mortgagees realized their security upon the testator's property. It was then only that the executors could have proved. A sum of 122*l.* had been previously paid by them; but they could not prove in respect of that sum, because, so long as the mortgagees were unpaid, they, and not the surety for the mortgagor, were the persons to prove. No doubt, in 1869, the executors might have proved; but, as a matter of fact, they did not. If they had proved, it seems to me that their right of retainer would have been gone altogether, except possibly to the extent of some dividend; and for that I think *Stammers* v. *Elliott* (1) and *Armstrong* v. *Armstrong* (2) are clear authorities. Again, if the executors had not proved, but the bankrupt had obtained his discharge, I think the same result would have followed, and *In re Orpen* (3) proceeds upon that principle. There the creditor had not indeed proved in bankruptcy; but there was a composition deed to which, though he had not assented to it, the statutory majority of the creditors had assented, so that the composition became binding on all the creditors, whether they had assented or not; and he, being thus bound by the composition, was in the same position as if he had proved in bankruptcy; and, that being so, it was held that there was no right of retainer except for the amount of the composition.

Another case cited in support of the contention that there is no right of retainer was *Re Rees*. (4) There a testator had proved in his lifetime against the estate of a liquidating debtor to whom he bequeathed a legacy, but the right to sue for the debt due on the proof was suspended by the Bankruptcy Act till after the date when the legacy was payable; and, therefore, it was held that the executors could not retain a legacy payable

(1) L. R. 3 Ch. 195.
(2) L. R. 12 Eq. 614.
(3) 16 Ch. D. 202.
(4) 60 L. T. (N.S.) 260.

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in præsenti to satisfy a debt which would not become payable until a future date. That case is quite distinguishable from the present. In the present case there has not been any proof; the executors have never proved, the bankrupt has not received his discharge, and the executors have a right to prove now.

It is contended that they have a right of proof and nothing else, and that the bankrupt's share ought to be paid over to the assignees, leaving it open to the executors to prove in the bankruptcy, and get what they can. I do not see on what principle they can be compelled to do that. They have the money, and it is said that they ought to hand it over to the assignees, and then they, as trustees of the testator, in which capacity they have handed it over, should claim to get it back again from the bankrupt's estate; succeeding, as they necessarily must, except that there might be other creditors who would be entitled to share with them. I can see no reason why they should hand over what they have got belonging to the testator's estate in order that they may get it back for that estate. And not only is there no principle in support of this contention, but I think there is clear authority against it.

On this point I may refer to *In re Whitehouse* (1), before Stirling J. The material facts are shortly these: A man had contracted to purchase a business, and his father, as his surety, had joined with him in promissory notes for instalments of the purchase-money, which were given to Cartland, the vendor. The son never paid any of the notes, but the father paid one of them in his lifetime, and he died having by his will given a share of his property to his son for his life, and having directed that advances to him made in the testator's lifetime were to be taken as part of the share. After the father's death the son executed a creditors' deed, by which his creditors released him, but reserved their rights against his sureties. Cartland proved under the deed for the balance due on the promissory notes, but failed to obtain payment. He then carried in a claim against the father's estate, and the executors paid the amount less a discount. The question arose in the administration of the

(1) 37 Ch. D. 683.

father's estate what was the son's share, and it was held that the executors of the testator, having paid the amounts of the promissory notes falling due after his death, were entitled to elect whether they would recover against the principal debtor under the agreement arising out of the suretyship, in which case they would be entitled to be paid or retain out of the income of the son's share; or whether they would stand in the place of the vendor, the principal creditor, whom they had paid; but that in the latter case they must give up their right of retainer. Stirling J. said (1): "The surety was not released by the execution of that deed, and the executors were right in paying, as they did, the sum due on the promissory notes. Then what is their position? They are, I apprehend, entitled to two rights. They may either recover directly against the principal debtor, the son George Frederick Whitehouse, upon the agreement for indemnity which arises out of the contract of principal and surety, or they may stand in the place of the principal creditor whom they have paid, and take the benefit of all the rights and remedies of that creditor against George Frederick Whitehouse. That applies more particularly with reference to the proof, because the estate comprised in the deed is to be wound up according to the law of bankruptcy, and I apprehend it is not the practice of the Bankruptcy Court to allow a double proof in respect of the same debt; that is to say, if the executors choose to come in under this deed they must adopt the proof already made by Cartland, and stand exactly in his place. Then upon that arises this question—if they choose to stand in Cartland's place, will not the release which he gave to the son, George Frederick, be effective as between the executors and George Frederick? It seems to me that it will, and I am confirmed in that view by the case of *Stammers* v. *Elliott*. (2) I think, therefore, that the position of the executors is this, they may choose whether they will stand on the original contract of principal and surety, in which case they are in no way bound by the terms of the creditors' deed, and will be entitled to be paid out of the income; or they may choose whether they will go in under the deed, in which

(1) 37 Ch. D. 694. (2) L. R. 3 Ch. 195.

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case they will be bound by the release contained in that deed, and must give up the right of retainer."

The same thing is laid down as clearly by Lord Chelmsford in *Stammers* v. *Elliott*. (1) It is true that what he said was merely a dictum, because there had been a proof in the bankruptcy. But Lord Chelmsford said (2): "With respect to the 850*l*. due from the bankrupt's estate to the estate of Joseph Tiercelin, there is this peculiarity attending it—that it enters into and forms part of the residue under the will of Joseph Tiercelin, and also goes to increase the amount of the estates of the several intestates." There the claim of the bankrupt was not only to a direct share of his own, but indirectly to further shares by reason of the intestacy of the original takers of those shares. Then Lord Chelmsford continued: "The bankrupt would thus be entitled as one of the residuary legatees to one-fourth of his own debt, and also to his share of the benefit arising from the addition it would make to the shares of the intestate residuary legatees. Upon this state of things it would be inequitable that the assignees of the bankrupt should be allowed to claim everything to which the bankrupt is entitled under the will and the intestacies, and yet not be compelled to bring in what is due from him to the estate. If, therefore, the 850*l*. were a subsisting debt, I should have thought that it must have been brought into account by the assignees, and that the bankrupt's share in the residue under the will and under the intestacies could only be ascertained by first taking the 850*l*., part of Joseph Tiercelin's estate, and then calculating the amount of the bankrupt's share in the residue and in the intestacies upon that footing. But I am compelled to differ from the Vice-Chancellor's opinion that the proof of the debt by John Joseph Tiercelin did not extinguish it against the residuary legatees." Then Lord Chelmsford added (3): "Now, although a trustee may not be allowed to prejudice the cestuis que trust by an act of this kind, yet an executor has an absolute power over the debts due to his testator, and may deal with them as he pleases. If he, therefore, proves a debt under

(1) L. R. 3 Ch. 195. (2) L. R. 3 Ch. 199.
(3) L. R. 3 Ch. 200.

a bankruptcy, it has the same effect as if he were proceeding in his own right, and consequently the debt must be held to be satisfied."

Those two cases are, I think, in point, and the result is, that the legal personal representative of the testator has a right of retainer.

Then arises the question, What is he entitled to retain? It was suggested that he might retain on behalf of the estate of the deceased mother, and the brother and sister, the sums which they contributed to keep down the interest, and the premiums on the policy. I do not see how there can possibly be any right of retainer in respect of those sums. They did not come out of the testator's estate, and no debt is due to the testator's estate in respect of them, and there is no equity by virtue of which the executors can retain a debt due, not to the testator's estate, but to some other person, in order that they may hand over the amount retained to that person.

Then as to the 122*l.*, the part of the contribution for interest and premiums which was paid by the executors, I think the executor has a clear right of retainer. That sum was paid by the executor by reason of the testator's obligation under the mortgage deed, and the testator had a right to be indemnified against such a payment by the principal debtor, for whom he was surety. It follows that there is a right to retain also the 578*l.* which was deducted by the mortgagees from the proceeds of sale in satisfaction of their claim. And I think this right of retainer carries with it also the right to retain interest at 4 per cent. I understand that the interest reserved by the mortgage deed was 5 per cent.; but it does not follow that, because the mortgagee is by contract entitled to interest at that rate, that is the rate which the surety ought to receive in the absence of any contract as to interest. No doubt in *Petre* v. *Duncombe* (1) a jury gave 5 per cent. interest to a surety by way of damages. But there the principal debtor had stated an account allowing interest at 5 per cent. on some previous payments. I think I ought to allow only 4 per cent. That is the rate of interest

(1) 20 L. J. (Q.B.) 242.

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which the Court generally gives in such cases, and in *In re Akerman* (1) that rate was allowed.

A claim has also been made to retain something in respect of consequential damage. I assume that means that the reversion, when sold by the mortgagees, did not perhaps realize its full value, and certainly not as much as it would have realized if they had waited till it fell into possession. No proof has been given of any consequential damage, and I do not see how there can be any retainer in respect of it. Of course, two-ninths of the amount retained by the executor will belong to the bankrupt, and his assignees will be entitled to that.

Solicitors: *Lowe & Co.; Whites & Co.*

(1) [1891] 3 Ch. 212.

W. L. C.

STIRLING J.

1895

Dec. 12.

1896

Jan. 22.

In re BERRY.
DUFFIELD *v.* WILLIAMS.

[1894 B. 1201.]

Practice—Adding Parties—Pending Action—Receiving Order in Bankruptcy against Defendant—"Change or Transmission of Interest or Liability"—Official Receiver—Carrying on Proceedings against—Rules of Supreme Court, 1883, *Order* XVII., *r.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52) —*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71).

An official receiver in bankruptcy, having no estate or interest vested in him nor any power conferred on him by the Bankruptcy Acts of bringing or defending actions, stands in a different position from a trustee in a bankruptcy or a trustee of any composition or scheme in bankruptcy.

Accordingly the making, after the commencement of an action, of a receiving order against a defendant does not cause any such change or transmission of interest or liability within the meaning of Order XVII., r. 4, as to render it necessary or desirable that the official receiver should be made a party to the action.

Such a transmission of interest or liability within rule 4 of the order would, however, take place when an adjudication order was made, or when a composition or scheme was approved by the Court.

THIS action was brought in March, 1894, by the residuary legatees under the will of Ann Berry against the defendants, the Rev. John Williams and John Lewis, as the executors and trustees thereof, claiming to have certain accounts and inquiries as to the residuary estate taken and made, and payment of part of such estate, and, if necessary, to have the estate administered and the trusts of the will carried into execution. The main object of the action was to make the two defendants liable for a breach of trust which had been committed by Mr. John Lewis, who had misappropriated a portion of the estate.

In April, 1894, an order was made by the judge in chambers directing the defendants to deliver certain accounts, and to pay into court a sum of 1500*l.* admitted to be in their hands.

The certificate of the chief clerk as to the result of these inquiries was made on April 5, 1895, and subsequently two summonses were taken out in the action. One, on April 11, 1895, by the defendants to vary the certificate, and the other,

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on July 9, 1895, by the plaintiffs for payment into court and otherwise of the sums certified to be due by the defendants on account of the residuary estate.

On June 24, 1895, a receiving order in bankruptcy was made against the defendant John Lewis, upon his own petition, in the county court of Denbigh.

Llewellyn Hugh Jones, the official receiver for the bankruptcy district of Chester, was the official receiver in the matter of the pending bankruptcy proceedings, and on November 4, 1895, an order of course was made in the action upon the petition of the plaintiffs that the proceedings in the action should be carried on between the plaintiffs and the defendants, the Rev. Thomas Williams and John Lewis, and the said L. H. Jones, as such official receiver, as a co-defendant.

Mr. L. H. Jones was served with this order, an appearance was entered for him, and this was a summons taken out by him and now adjourned into court to discharge the order of November 4, 1895, by which he was made a co-defendant.

The summonses of April 11 and July 9, 1895, were still pending, and no adjudication in bankruptcy had yet been made against John Lewis, nor had any trustee of his estate been appointed.

Ingle Joyce, for the official receiver. To bring an official receiver before the court as a party to an action merely upon the making of a receiving order is an unheard-of proceeding. The making of such an order does not cause any "change or transmission of interest" within the meaning of Order XVII., r. 4. (1) Under s. 9 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), an official receiver is constituted receiver of the debtor's property, and no creditor has any remedy against the property or person

(1) Order XVII., r. 4, is, so far as material, as follows: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability . . . . it becomes necessary or desirable that any person not already a party should be made a party . . . . an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex-parte on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability."

of the debtor, or can commence any proceedings against him without the leave of the Court; but there is no divesting of the debtor's property until an adjudication order is made and the trustee in bankruptcy is appointed. A receiving order is not equivalent to an adjudication in bankruptcy. Notwithstanding such an order, the debtor is, until a trustee is appointed, the only person who can sue and be sued (though, of course, with the leave of the Court), and what he can recover is his own property, though he may be required to hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them: *Rhodes* v. *Dawson*. (1) In this case there has been no adjudication, and no action will lie against the official receiver. The order of November 4, 1895, ought therefore to be discharged. If the official receiver did not apply to discharge the order he might be held liable for the costs of the action; so this is his only remedy: *Watson* v. *Holliday*. (2)

Hastings, *Q.C.*, and *Begg*, for the plaintiffs. This is a case of transmission of interest or liability within the words "or any other event" in rule 4 of Order XVII. The event which has happened is that a receiving order has been made against one of the defendants. The material enactments of the Bankruptcy Act, 1883, are ss. 5, 9, 30, 39, 54, and 56, and Sched. II., rr. 2 and 22; and these must be read together. Sect. 5 shews that a receiving order is made for the protection of the estate of the debtor; sect. 9 provides that on the making of a receiving order an official receiver shall be thereby constituted receiver of the debtor's property, and that no creditor shall have any remedy against the person or property of the debtor, or shall commence any proceedings against him without leave of the Court. Sect. 30 enacts (inter alia) that an order of discharge shall not release the bankrupt from any liability incurred by means of any fraudulent breach of trust to which he was a party, or to release his co-trustee; sect. 39 enacts that the rules in Sched. II. as to proof of debts shall be observed; sect. 54 provides: "(1.) that until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the

(1) 16 Q. B. D. 548. (2) 31 W. R. 536.

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property of the bankrupt shall vest in the trustee; (2.) on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed; (3.) the property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever." And s. 56 specifies the various things which the trustee may do in dealing with the property of the bankrupt. Then Sched. II. provides (rule 2) that a debt may be proved by delivering or sending an affidavit to the official receiver, or if a trustee has been appointed to the trustee; and (rule 22) that the trustee is to examine every proof and admit it or reject it in whole or in part.

Under the order the official receiver has become the receiver of this defendant's property in the same manner and to the same extent as if he had been appointed receiver thereof by the Court, and although the estate may still be vested in the debtor he has to hand it over to the possession of the receiver. So there is a change in the possession and in the liability which renders it necessary or desirable to bring the official receiver before the Court. Our debt has not been formally proved. We must prove it against the debtor's estate in the bankruptcy; and it is the duty of the official receiver to receive or reject the proof, for the ascertainment of the debt by two proceedings, one here and one in bankruptcy, will not be allowed. If the official receiver is not a proper person to bring before the Court we shall be hung up, and shall be obliged to wait until a trustee is appointed. A composition or an adjudication may be proposed behind our backs; and if the official receiver can admit our proof, he ought to be here to see that it has been properly put before the Court.

If the official receiver is not before the Court, the question of the liability of the debtor may have to be tried twice over, which would be highly inconvenient: *Ex parte Smith.* (1) In *In re Sartoris's Estate* (2) a debtor was entitled to the income of residue during his life or until he should do something

(1) 2 Ch. D. 51. (2) [1892] 1 Ch. 11.

by which it became payable to some other person, and, a receiving order having been made against him, it was held by Chitty J. that though the income did not vest in the official receiver, it would by the force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, and that the interest of the tenant for life had determined. In this case a change has been effected both in the interest and in the liability of the debtor, who is a fraudulent bankrupt. The authorities shew that if there had been an adjudication it would have been a matter of course to have made the trustee in bankruptcy a party: *Ex parte Coker* (1); *Barter & Co.* v. *Dubeux & Co.* (2) The official receiver is in the same position as such trustee, and he is brought before the Court in order to bind the estate of the bankrupt debtor, so that we may be able to establish our debt and prove for it at once.

Ingle Joyce, in reply, cited *Lloyd* v. *Dimmack* (3) and *School Board for London* v. *Wall Brothers*. (4)

Hastings, Q.C., referred to *Emma Silver Mining Co.* v. *Grant*. (5)

Cur. adv. vult.

1896. Jan. 27. STIRLING J., after stating the facts of the case, continued:—The order of November 4, 1895, is sought to be justified under Order XVII., r. 4. [His Lordship then read that Order, and continued:—]

It is said that an event, namely, the making of a receiving order, has occurred since the commencement of the action "causing a change or transmission of interest or liability," which renders it necessary or desirable that a person not already a party, namely, the official receiver, should be made a party to the action. To decide whether this is so, the provisions of the Bankruptcy Acts now in force must be considered. The material sections appear to be these: [His Lordship then read or referred to ss. 5, 8, 9, 10 (sub-s. 2), 15, 20, 39, 57 (sub-s. 2),

(1) L. R. 10 Ch. 652.
(2) 7 Q. B. D. 413.
(3) 7 Ch. D. 398.
(4) 7 Times L. R. 566.
(5) 17 Ch. D. 122.

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68, and 72, Sched. I., rr. 1, 8, 9, and Sched. II., rr. 2, 22, 27, of the Bankruptcy Act, 1883; and ss. 3 (sub-s. 2), 12, 14, 16, 17 of the Bankruptcy Act, 1890, and continued:—] On these sections it appears to me that no estate or interest has become vested in the official receiver: see *Rhodes* v. *Dawson*. (1) In that case Lindley L.J., towards the end of his judgment, said (2): "The law relating to receiving orders is contained in ss. 5 et seq. of the Bankruptcy Act, 1883; and from them it appears that a receiving order is not equivalent to an adjudication of bankruptcy; it does not divest the debtor of his property, nor make him a bankrupt, nor place him under the disabilities of an adjudicated bankrupt. Notwithstanding a receiving order, the debtor is the only person who can sue for the recovery of what belongs to him; and if he does so sue, he cannot be regarded as the mere instrument of some other person or persons, and so be brought within the principle applicable to cases of that kind, unless and until he becomes bankrupt. What the plaintiff recovers in the action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. It may be that his property and right to sue never will be divested from him; and until it is, he is in no worse position as regards suing than any other plaintiff in embarrassed circumstances, and who may be made bankrupt at any moment if proper proceedings are taken against him."

I think, therefore, that the making of the receiving order has not caused any change or transmission of interest, and if the defendant Lewis had been a plaintiff in the action asserting his rights against some person or persons in this Court, it appears to me that the defendant or defendants in such an action could not have insisted that under Order XVII., r. 4, the official receiver ought to be made a party to the action.

When, according to the provisions of the Bankruptcy Acts, will a change or transmission of interest or liability occur? One or other of three events may happen: there may be (1.) an adjudication of bankruptcy, or (2.) there may be a composition

(1) 16 Q. B. D. 548. (2) 16 Q. B. D. 553.

or scheme of arrangement, or (3.), what is possible though improbable, the debtor may pay his debts. If there is an adjudication of bankruptcy the estate will vest in the trustee, and there will then be a change of interest. If a composition or scheme is accepted and approved then, regard being had to the provisions of s. 3 of the Bankruptcy Act, 1890, it appears to me that a change of liability will only be caused when a scheme of composition has become binding, being accepted by the creditors, and approved by the Court. This change of liability may or may not be accompanied by a change of interest, according as the composition or scheme does or does not provide for the appointment of a trustee in whom property is vested. If the debtor pays his debt there will be no change of interest.

The conclusion at which I arrive is that no change either in interest or liability will occur until a composition or scheme has been approved by the Court, or an adjudication in bankruptcy has been made.

I leave out of consideration the peculiar circumstances of this case, in which it may be that the plaintiff may proceed both against debtor and trustee, and I am willing to assume (as the cases cited in the argument appear to shew) that, subject to any question which may arise as to obtaining the leave of the Bankruptcy Court under s. 9 of the Act of 1883, the plaintiffs in this action will be entitled to have the trustee in the bankruptcy, or the trustee of any composition or scheme, made a party, under Order XVII., r. 4, because a change of interest or liability will have occurred; but it appears to me that the official receiver stands in a different position. He has no estate vested in him, nor has he, like the trustee in bankruptcy, any power conferred on him of bringing or defending actions. The object of his appointment is to protect the estate (s. 5); his duties, so far as they relate to the administration of the estate, are confined to its management and protection, and his powers for that purpose are defined by reference to those of a receiver or manager appointed by the High Court (s. 70, sub-ss. 1, 2). In particular, it is to be observed that no power is conferred nor is any duty imposed on him in his character of official receiver of dividing the estate or any part of it among the creditors, as

STIRLING J. has the trustee in a bankruptcy or of a scheme or composition. He has power to receive and deal with proofs, but only for this reason, that the persons who have power to vote at meetings are creditors who have proved. The language of ss. 9 and 10 of the Bankruptcy Act, 1883, appears to me to shew that the Legislature did not contemplate that the official receiver (although he has power to deal with proofs) should be mixed up with actions pending against the debtor. Sect. 9 prohibits the "commencing" of actions or proceedings, except with the leave of the Court; and I agree with the opinion expressed by North J. in *In re Wray* (1) that it has no reference to proceedings actually pending against the debtor at the date of the receiving order. Such pending proceedings are dealt with by s. 10, sub-s. 1 of which applies to the interval between the presentation of a bankruptcy petition and the making of a receiving order; while sub-s. 2 applies to any time after the presentation of a bankruptcy petition. The scheme appears to be that actions and other proceedings are to go on against the debtors unless either the Court of Bankruptcy or the Court in which the proceedings are pending sees fit to interfere in the exercise of the discretion vested in it. In the present case the Court of Bankruptcy has not seen fit to interfere; and I do not think that this Court ought to interfere, unless and until there is caused a change of interest or liability within the meaning of Order XVII., r. 4—an event which, in my opinion, has not yet occurred.

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I think, therefore, that the order must be discharged.

Solicitors: *Walter Murton; Duffield & Bruty, for Kelly & Keene, Mold.*

(1) 36 Ch. D. 138, 143.

W. W. K.

In re HILL'S WATERFALL ESTATE AND GOLD MINING COMPANY.

STIRLING J.

1896

March 6, 31.

Company—Voluntary Winding-up—Reconstruction—Option of Shareholders to take Shares in new Company—Application by Shareholder—Failure of Liquidator to procure Allotment—Liability in Damages—Jurisdiction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 98, 133, 138, 151, 161—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 10, 13—*Companies Winding-up Rules*, 1890, *rr.* 89, 90.

A scheme for the reconstruction of a company, which was in voluntary liquidation under the supervision of the Court, provided that the undertaking should be sold to a new company, and that the shareholders should have the option of taking shares in the new company in proportion to their holding in the old. In accordance with the terms of a circular issued by the liquidator, B., a shareholder in the old company, signed an application for shares in the new company and sent it, with a cheque for the required deposit, to the bankers of the company, who sent him a receipt therefor. The bank subsequently sent to the liquidator, at his request, a list of persons who had applied for shares, but did not include therein the name of B. The liquidator afterwards sold the whole of the shares unapplied for, together with those which should have been allotted to B. He had no assets undistributed in his hands except the proceeds of sale of the shares unapplied for, and he had no shares which he could allot to B. Upon a summons by B. in the winding-up :—

Held, that the Court had no jurisdiction to declare the liquidator liable in damages.

THIS was a summons in the winding-up of the above-named company asking that the liquidator of the company might be ordered forthwith to procure an allotment or transfer of 450 shares in the Waterfall Estate and Gold Mines Company, which the applicant had agreed to take under the reconstruction scheme of the above-named company, or in the alternative that the liquidator might be ordered to pay to the applicant damages to be ascertained on inquiry.

The company went into voluntary liquidation on August 21, 1891, and on November 2, 1891, an order was made continuing the winding-up under the supervision of the Court. On January 7, 1895, a meeting was held under the direction of the Court to consider a scheme for the reconstruction of the

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company and the propriety of the liquidator's entering into an agreement for the sale of the undertaking to a new company. The meeting sanctioned the scheme, and on January 25 the liquidator entered into an agreement which provided (inter alia) that, as part of the consideration for the sale, the new company should allot and issue to the liquidator, or as he should direct, 3381 shares of 5*s.* each in the new company, credited as fully paid up, and 87,953 shares of 5*s.* each, with the sum of 3*s.* 6*d.* credited as paid up thereon respectively. Each share of the old company upon which 1*l.* had been credited as paid up was to entitle the holder thereof, as nominee of the liquidator, to an allotment of one of the fully paid-up shares in the new company to be issued as aforesaid, and each share in the old company upon which 16*s.* 6*d.* only had been paid up was to entitle the holder as the nominee of the liquidator to an allotment of one share in the new company with 3*s.* 6*d.* credited as paid up thereon. On February 1 the agreement was approved by the Court, and the new company was subsequently incorporated. On March 23, 1895, the liquidator issued a circular to the shareholders in the old company offering them shares in the new company in accordance with the terms of the agreement. The applicant, Mr. Bayliss, was the holder of 450 shares upon which 16*s.* 6*d.* had been paid up, but he did not at first apply for shares in the new company. Numerous applications for shares in the new company were, however, received by the liquidator, and on May 1 he issued two further circulars, the first of which was in the following terms: "Sir,—Referring to my circular to you of March 23 last, I have to inform you that I have received applications from the shareholders for the allotment of 48,716 shares in the Waterfall Estate and Gold Mines, Limited, upon which 6*d.* per share has been paid, and these shares will be allotted in due course. As you have not applied for the shares to which you were entitled under the reconstruction scheme, I now give you final notice that unless you send in your application to the London and Westminster Bank, Limited, together with the deposit of 6*d.* per share, on or before May 10 next, you will be deemed to have finally refused an allotment of shares in the new company, and you

will be excluded from allotment accordingly, and your right to apply for such shares will be disposed of by me as liquidator in such manner and for such consideration as I may deem expedient and as provided by clause 5 of the said scheme of reconstruction. No further notice will be given to you." The other circular was as follows: "Pursuant to the proposed scheme of reconstruction, 48,716 shares in the Waterfall Estate and Gold Mines, Limited, have been applied for, and will be duly allotted. This leaves about 40,000 shares still available for application. I have given notice to the shareholders who have not applied stating that unless they exercise their option to apply for these shares and pay the deposit of 6*d.* per share on or before the 10th May inst. I shall offer the same for sale pursuant to the 5th clause of the scheme of reconstruction. In the event of the whole or part of these 40,000 shares not being taken up by the shareholders entitled to the same, I take this opportunity of informing you that I am open to receive from all the shareholders of the company tenders for such of the said shares as shall not be previously applied for by the shareholders. If you wish to tender, I must receive your offer on the annexed form on or before the 10th May inst., but I do not bind myself to accept the highest bidder or any tender in respect of such shares."

Mr. Bayliss acted upon the first of these circulars and signed an application for 450 shares in the new company, which he sent, together with a cheque for the amount of the deposit, to the bankers of the liquidator, from whom on May 9 he received a formal receipt. On May 10 a Mr. Renton made a tender to the liquidator for the purchase of all the shares which had not been taken up. Subsequently the liquidator communicated with the bankers and asked them for a list of persons who had applied for shares. The bankers furnished the required list, but failed to include in it the name of Mr. Bayliss, and no shares were allotted to him.

On May 13 the liquidator accepted Mr. Renton's tender, and procured an allotment to him of the whole of the remaining shares in the new company, including those which should have been allotted to Mr. Bayliss.

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On June 12, 1895, Mr. Bayliss received a letter from the secretary of the new company informing him that no allotment had been made to him, and that a cheque for the amount of the deposit paid by him had been signed by the directors, and would be handed to him in exchange for his deposit receipt. He then communicated with the liquidator, from whom he received the following letter dated June 22 :—

"Sir,—Your right to apply for shares in the Waterfall Estate and Gold Mines, Limited, conferred upon the shareholders of the above company by the scheme of reconstruction sanctioned by the order of the Court not having been exercised by you, such right has now been disposed of in accordance with clause 5 of the said scheme, the amount realized being 1*s.* 3*d.* per share. You may now receive the sum of 26*l.* 14*s.* 4*d.* as shewn below, being 1*s.* 3*d.* per share on the shares held by you in the Hills Waterfall Estate and Gold Mining Company, Limited, less a deduction of 5 per cent. for expenses of sale and distribution."

And in reply to a request by Mr. Bayliss for further explanation the liquidator wrote to him as follows :—

"The amount payable by you on application was not credited in the company's bank book until after May 11, and therefore your name was not included in the allotment list, and your shares were sold in accordance with the scheme of reconstruction."

Mr. Bayliss then took out this summons.

Hastings, Q.C., and *R. J. Parker*, for the applicant. The liquidator is responsible for the acts of his agents, the bankers. In consequence of their omission the liquidator has now no shares which he can allot to Mr. Bayliss. He must either purchase shares in the market and transfer them to the applicant, or else be answerable in damages for the breach of contract.

[*Buckley, Q.C.*, for the liquidator. The question of the liquidator's liability for negligence is not properly raised upon summons in the winding-up. There ought to have been an

action instituted, in which the liquidator could have brought in the bank as third parties.]

The applicant was entitled to come to the Court under s. 138 of the Companies Act, 1862.

Buckley, Q.C., and *G. F. Hart*, for the liquidator. There are two questions to be considered: (1.) Is this a proceeding in which the Court can entertain the question of damages? And, (2.) Can the liquidator be held liable in damages?

No doubt the application in respect of the shares would be right if the liquidator had any shares in his possession; but he has not, and the Court has no jurisdiction to hold him liable in damages. Sect. 10 of the Companies (Winding-up) Act, 1890, which is a re-enactment, with some modification, of s. 165 of the Act of 1862, no doubt gives the Court power to assess damages against delinquent directors, officers, and promoters, but the summary relief thereby given is for the benefit of the company, and no contributory has any right to damages for anything done by the liquidator.

[STIRLING J. Supposing the liquidator had failed to pay to a creditor a dividend to which he was entitled, could not the creditor in such a case apply?]

Not summarily. The company is quite unaffected by this question, and the applicant has no remedy under the statute.

[STIRLING J. Cannot the Court inquire into the way in which the liquidator discharges his duties?]

There is no summary remedy against the liquidator for negligence at the suit of a contributory. The proper remedy is by action for negligence against the liquidator, in which the issues would be clearly defined upon the pleadings. The liquidator in such an action would have a right over against the bank, whom he could bring in as third parties.

[STIRLING J. Is not the liquidator an officer of the Court in the same way as a receiver is?]

In some respects no doubt he is; but he is not in the same position as a receiver. An erroneous practice has grown up of taking proceedings by or against a liquidator as distinguished from proceedings by or against the company where there is a liquidator. Generally, the application ought to be by the

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corporation except in certain cases enumerated in s. 95 of the Act of 1862: *Ex parte Kintrea.* (1) Here it was the old company who made the blunder, no doubt acting by the liquidator.

The liquidator is not directly responsible to the contributory at all. The contributory may have rights against the corporation; he has none against the liquidator: *Knowles* v. *Scott.* (2)

Hastings, Q.C., in reply. Under s. 161 it is the liquidator who has to act, and not the company. As regards the person who applies for shares, the liquidator is principal and not agent. In the case suggested by your Lordship of the liquidator paying a dividend to the wrong person and having no assets in his hands, the creditor or contributory could apply under s. 138. This is a stronger case. If the company ought to be a party to the proceedings the summons can be amended by using the name of the company if necessary; but it is not necessary. Even if there be no jurisdiction to direct an inquiry as to damages, the Court can make a declaration which will enable us to found an action against the liquidator. There is nothing in s. 10 of the Act of 1890 which precludes the liquidator from being held liable in damages to a contributory for personal misfeasance.

[STIRLING J. If the Court had a general jurisdiction, where was the necessity for s. 10?]

It cannot be disputed that a contributory has a right to proceed against the liquidator in certain cases. There is complete jurisdiction to make the order asked for upon the summons, and the applicant is entitled to an inquiry as to damages.

Cur. adv. vult.

March 31. STIRLING J. Upon the hearing of the summons two questions were argued, first, whether there was any liability on the part of the liquidator, and secondly, if there was, whether it could be enforced upon the summons in the matter of the winding-up. I will deal with the second question first. The fact is that all the assets of this company have been distributed, except the proceeds of sale of the shares in the hands of the liquidator; but he has not in his hands any shares by

(1) L. R. 5 Ch. 95. (2) [1891] 1 Ch. 717.

means of which he can fulfil the liability to procure an allotment to the applicant if that liability exists. That being the state of things, it seems to me that the first alternative in this summons cannot be fulfilled by the liquidator out of any assets in his hands, and that in substance it is really asked that he may be made liable in damages either for a breach of contract or for a breach of his duty as liquidator; and the question is whether the Court has jurisdiction to enforce such a liability in the matter of the winding-up.

Now, if any assets of the company remained in the hands of the liquidator applicable for the purpose, I think the Court would have full jurisdiction to direct him to apply them; but the facts do not admit of that being done, and therefore I must leave that out of consideration. Then what other jurisdiction has the Court? First of all, there is the jurisdiction conferred by the 10th section of the Companies (Winding-up) Act of 1890, which is a repetition with some modifications of that conferred by s. 165 of the Act of 1862. That section enacts that, "Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company . . . ." then the Court may inquire into the conduct of the liquidator, and so forth. Now that applies only where the liquidator has misapplied or become liable for or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company. Here the shares in question were not, as it seems to me, the property of the company; they were the property in equity of the shareholder, Mr. Bayliss, if the liability existed; and any breach of trust or misfeasance which may have been committed in relation to those shares is not a breach of trust or misfeasance in relation to the company, but in relation to Mr. Bayliss himself, and I think that that section does not apply.

Then another ground on which it was suggested that the

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liquidator might be held liable was that of his being an officer of the Court. Now the position as regards that appears to me to stand thus: by s. 133 of the Act of 1862 it is provided that "The liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator." Then by s. 151, "Where an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily." If the matter rested there it would seem to me that the present liquidator could not be treated as an officer of the Court. But there is this further to be taken into consideration. Sect. 13 of the Act of 1890 provides that "General rules may be made for requiring or enabling all or any of the powers and duties conferred and imposed on the Court by ss. 91, 98, 99, 100, 102, and 107 of the Companies Act, 1862, to be exercised or performed by the liquidator as an officer of the Court, and subject to the control of the Court." Then rules have been made under that section, namely, the Companies Winding-up Rules of 1890. Rule 89 provides: "The duties imposed on the Court by s. 98 of the Companies Act, 1862, with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the liquidator as an officer of the Court subject to the control of the Court"; and rule 90: "For the purpose of the discharge by the liquidator of the duties imposed by s. 98 of the Companies Act, 1862, as varied by s. 13 of the Companies (Winding-up) Act, 1890, and the last preceding rule, the liquidator shall for the purpose of acquiring or retaining possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly."

Therefore, even if this were a compulsory winding-up the liquidator is only put in the position of an officer of the Court when he is discharging the duties imposed by s. 98; and in

the present case the liquidator was not acting under that section but under s. 161. It seems to me, therefore, that I cannot make an order based on that ground. I have failed to discover any statutory authority which would enable me to award damages against the liquidator, and I think the objection as to want of jurisdiction must prevail.

Solicitors: *Miller, Smith & Bell, for Fowler & Langley, Wolverhampton; Michael Abrahams, Sons & Co.*

G. A. S.

KEKEWICH J. 1896 Feb. 12.

In re GILES. JONES *v.* PENNEFATHER.

[1892 G. 2201.]

Administration—Executor—Debt—Surety—Indemnity—Right of Retainer—Delay.

In an administration action an executor does not lose his right of retainer merely by reason of delay—such as not claiming his right until after the chief clerk has made his certificate under the judgment—or by the fact of his having paid the assets into court or to a receiver, provided the delay can be satisfactorily explained and there are assets against which he can exercise his right.

The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator creates an equitable debt in respect of which he may exercise the right of retainer.

In re Harrison (32 Ch. D. 395) considered.

In March, 1891, the testator, Thomas Giles, was indebted to his bankers in the sum of 1000*l.*, and, with the defendant Colonel Nicholas Pennefather, gave them a joint promissory note for the amount and interest, Pennefather joining as surety only. No part of the 1000*l.* was ever paid either by the testator or Pennefather.

The testator died in 1892 insolvent, and thereupon this creditors' action for administration was brought against his executors, of whom the defendant Pennefather was one. On November 21, 1892, the usual judgment for administration was pronounced, and on January 23, 1893, a receiver was appointed. The executors paid into court in the action, or to the receiver, various sums arising chiefly from the sale of the testator's farming stock, and they had no assets now in their hands.

In July, 1895, the chief clerk made his certificate, allowing in full, amongst other debts, a large debt due from the testator to his bankers, including the 1000*l.*, the subject of the promissory note, with interest.

The testator's bankers, finding his assets insufficient for payment in full of the debt due on the promissory note, applied

for payment to the defendant Pennefather, who thereupon, in November, 1895, took out a summons asking that he might be at liberty to come in and assert his claim for the amount notwithstanding the time limited for entering claims had expired; and that he might be at liberty to exercise his right of retainer, as one of the executors of the testator, in respect thereof.

On this summons coming on before the chief clerk, he allowed the applicant to prove, and ordered 1000*l.*, part of the funds in court in the action, to be carried over to an indemnity account for the benefit of the applicant, thus recognising his right to recoup himself in full any amount which he might be called upon to pay under the promissory note.

The plaintiff, on behalf of himself and the other creditors of the testator, objected to the chief clerk's order; and thereupon the summons, together with the further consideration of the action, was adjourned into court, and now came on for hearing.

In an affidavit in support of the summons, the defendant Pennefather stated that he entered into the promissory note simply as surety; and he explained, as reasons for his not having made his claim before, that he thought it unnecessary to do so, inasmuch as the bankers' claim had already been allowed by the chief clerk, and also that his rights as an executor did not require any special claim to be made by him; and he asked that he might be at liberty either to retain the amount due under the promissory note, or that a sufficient amount might be retained out of the funds in court to indemnify him against the bankers' claim. It appeared that there were, either in court or in the hands of the receiver, legal assets of the testator more than sufficient to satisfy the applicant's claim.

Warrington, Q.C., and *Sebastian*, for the applicant, the defendant Pennefather. The defendant claims that, as executor, he can exercise his right of retainer for the debt which he has been called upon to pay as surety for the testator. His right, according to the old and well-settled authorities, is really

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one of indemnity against the debt he is required to pay: *Nisbet* v. *Smith* (1); *Ferguson* v. *Gibson*. (2) The moment the testator died the defendant, as surety, had the right to insist upon the executors paying the debt out of the assets. Being himself an executor he had the executor's ordinary right of retainer in respect of the debt, and that right was not lost by payment of the assets into court or to a receiver: *Chissum* v. *Dewes* (3); *Richmond* v. *White*. (4)

In re Harrison (5) will probably be cited against us, and the circumstances in both cases are no doubt very similar; but the question of the right of the executor-surety to an indemnity was not argued, and neither *Nisbet* v. *Smith* (1) nor *Ferguson* v. *Gibson* (2) were cited. No allusion was made by either counsel or judge to the right of a surety to come into equity to be released from his obligation. That case, therefore, cannot be treated as an authority covering the present. We rely upon *Nisbet* v. *Smith* (1) and *Ferguson* v. *Gibson* (2) as the authorities which govern this case.

Renshaw, *Q.C.*, and *Waggett*, for the plaintiff, representing the general body of creditors. We do not dispute the law as to an executor's general right of retainer for his debt, but our contention is that in the present case the applicant is too late in claiming his right. This case is really covered by *Player* v. *Foxhall* (6), where, as here, the accounting party not having set up his right of retainer in due time was held to have lost his right. That case was approved of by Bacon V.-C., in *Ex parte Campbell*. (7) Here, before the defendant set up any claim to retain, the chief clerk had worked out the judgment, and moreover a receiver had been appointed; and it is settled by *In re Jones* (8) and other cases, that after a receiver has been appointed no retainer can be claimed by an executor out of money paid to that receiver. In *Ferguson* v. *Gibson* (2) no receiver was appointed. Again, we do not dispute the right of an executor-surety to come to this court to be relieved from

(1) 2 Bro. C. C. 579, 582.
(2) L. R. 14 Eq. 379, 386.
(3) 5 Russ. 29.
(4) 12 Ch. D. 361.
(5) 32 Ch. D. 395.
(6) 1 Russ. 538.
(7) 16 Ch. D. 198, 200.
(8) 31 Ch. D. 440.

his liability; but then the executor-surety must have paid the debt. The case comes precisely within *In re Harrison* (1), in which Pearson J. delivered a considered judgment. There it was held that the executor-surety's right of retainer could only be exercised against assets coming into his hands as executor, and only in respect of the debt actually paid by him as surety. So here, the defendant had not established his debt at the time he had assets in his hands and might have exercised his right of retainer. An executor cannot retain for a mere liability. He can only retain a legal debt, and out of legal assets: the debt must be legal and not merely inchoate: *Re Orme.* (2) In considering whether the right exists, you must first look at the time when the liability ripens into a legal debt, and, secondly, see whether at that time there are any legal assets. *In re Harrison* (1) is accepted as an authority both in Williams on Executors, 9th ed. pp. 893–4; and Seton on Judgments, 5th ed. p. 1286.

[KEKEWICH J. This case may very well be decided against you, and yet *In re Harrison* (1) remain unaffected by my decision.]

KEKEWICH J., after stating the nature of the summons, proceeded:—The general law, no doubt, is that any person claiming to be a creditor is allowed to come in and prove on reasonable terms at any time so long as there is anything against which his proof can usefully be established. Cases can be found in which a creditor has been allowed to come in and prove his claim, not only after further consideration, but even after second further consideration. He may come in on reasonable terms, that he shall not disturb any former dividend, and as to costs and other matters. As against the application of that rule in this particular case, *Player* v. *Foxhall* (3) is cited. Bacon V.-C. commented on that case in *Ex parte Campbell* (4), and then, speaking of the case before him, he says this: "This is a plain, straightforward case. The executor's right is one which, like any other, may be lost, forfeited, or

(1) 32 Ch. D. 395.
(2) 50 L. T. (N.S.) 51.
(3) 1 Russ. 538.
(4) 16 Ch. D. 198, 200.

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released. But I cannot entertain any doubt that, under an order that the estate shall be applied in payment of debts in a due course of administration, the executor's right to retain is preserved." In that case the question was as to the right of retainer apart from proof. In other words, the right of retainer or of proof may be lost, forfeited or released, and the learned judge pointed out that in *Player* v. *Foxhall* (1) the claim to retain had been made too late, and that under the circumstances he had lost his right. I should decide the same here if I were satisfied that the right had been lost, forfeited or released; but I see nothing of the kind. The explanation of the applicant's delay is perfectly simple. The bankers proved for the full amount due to them: the estate has not been distributed, and it may turn out that they will be paid in full and so have no claim against the surety; therefore there is not the slightest difficulty in admitting the right of proof.

Then comes the question as to the right of retainer. Colonel Pennefather is an executor, and he claims to retain in that character if he has got a present debt. The question is, Has he got a present debt? It was said by Kay J. in somewhat similar circumstances in *Re Orme* (2) that it was necessary to see whether the administrator of the intestate in that case—the administrator having been surety for the intestate—had to pay the debt, and he directed that the application should stand over in order that there might be an inquiry whether he had paid; but it would be absurd to do that here. As a matter of fact, Colonel Pennefather, who could not originally have been called upon to pay immediately, would now be at once called upon to pay. The assets are in court. The bankers knew he had a right of proof in this action, and if I ordered this application to stand over on that ground the application would be renewed to-morrow.

But then it is said that Colonel Pennefather has no right to retain until he has established his debt; and for that proposition the plaintiff relies on a decision by Pearson J.: *In re Harrison*. (3) The settled law is accurately stated in two

(1) 1 Russ. 538. (2) 50 L. T. (N.S.) 51. (3) 32 Ch. D. 395.

authorities—by Lord Thurlow in *Nisbet* v. *Smith* (1), and by Wickens V.-C. in *Ferguson* v. *Gibson*. (2) Did Pearson J. overrule those cases? Of course he did not. Did he differ from them? Nothing of the kind. In the first place, it was said that neither of those cases was cited in the case before Pearson J., and certainly the arguments in that case did not go into that particular point, and Pearson J. did not touch it. What he directed his mind to was this, that nothing was due to the executor before he was called upon to pay. That is perfectly true. There was no debt in that sense. As Wickens V.-C. says, it is a right to indemnity, a right which creates an equitable debt, but not a specialty debt. Pearson J. was perfectly accurate in saying that nothing was due to the executor, and then he devotes his mind to the question whether there could be a right of retainer, seeing that there were no assets—no moneys in his hands—at the time the debt matured. The learned judge says (3): "At the time he paid that sum there was no money in his hands. No money came to his hands which he could possibly retain. I hold, therefore, in respect of that debt, that he had no right of retainer."

Whatever may be the value of *In re Harrison* (4), it is entirely unaffected by anything I say on this occasion. It is a considered decision of a very eminent and careful judge, and it is enough to say that it does not affect the point I am now deciding. In my opinion Colonel Pennefather has this equitable debt subsisting, no doubt not yet converted into a debt of money which has become actually due simply by paying, but which may become so converted: against that debt he is entitled to be indemnified; and the proper result is to work out the indemnity by providing for payment of the debt to the bank in full, and then the rest of the estate will be distributed among the creditors pro ratâ.

There will accordingly be a declaration that Colonel Pennefather's claim to retain is to be allowed.

There will be one order on the summons and on the further

(1) 2 Bro. C. C. 579.
(2) L. R. 14 Eq. 379.
(3) 32 Ch. D. 397.
(4) Ibid. 395.

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consideration, and the costs of all parties will be costs in the action.

Solicitors: *Warren, Murton & Miller, for Hallett, Creery, & Co., Ashford, Kent; Kingsford, Dorman & Co., for J. Bannon, New Romney, Kent.*

G. I. F. C.

KEKEWICH J. 1896 *April* 16.

In re HILL. HILL *v.* PILCHER.

[1896 H. 721.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 33—"*Money liable to be laid out in the Purchase of Land*"—*Power to Trustees to Invest upon Request in Purchase of Particular Land.*

Money which the trustees of a settlement are empowered to invest, at the request of the tenant for life, in the purchase of particular land is money which is "liable to be laid out in the purchase of land" within the meaning of s. 33 of the Settled Land Act, 1882.

Where by a settlement, which comprised a moiety of certain freeholds, the trustees were empowered, at the request of the tenant for life, to invest money comprised in the settlement in the purchase of the other or unsettled moiety of the freeholds:—

Held, that the case came within s. 33 of the Settled Land Act, 1882, and that money in the hands of the trustees might be invested, as capital money, in the purchase by them, jointly with the owner of the unsettled moiety, of land convenient to be held together with the freeholds.

ADJOURNED SUMMONS.

Under the will of Jeremiah Pilcher, who died on July 18 1866, certain freehold hereditaments known as Stanton's Wharf Southwark, became vested in trustees upon trust for the testator's two daughters Mary Jane Pilcher and Marie Amelie Pilcher in equal moieties as tenants in common, subject to a trust in favour of their mother Mary Rebecca Pilcher during her life.

By the settlement, effected by two deeds dated April 25, 1870, made on the marriage of Marie Amelie Pilcher with the Rev. James Hill, the moiety of Marie Amelie Pilcher in Stanton's Wharf was conveyed to trustees upon trust for sale at the request of Marie Amelie Pilcher during her life and after

her death at the trustees' discretion, and certain stocks, funds, securities, and personal estate to which Marie Amelie Pilcher was absolutely entitled were vested in the same trustees, and it was declared that the trustees should hold the proceeds of sale of the moiety of Stanton's Wharf and the rents and profits thereof until sale, and the other settled property and the investments thereof, upon trust to pay the annual income to Marie Amelie Pilcher during her life for her separate use with a restraint on anticipation, and after her decease upon trusts in favour of her husband for his life, and of her children and issue; and it was expressly provided that it should be lawful for the trustees, at the request in writing of Marie Amelie Pilcher and James Hill or the survivor of them, to call in, sell, transfer, and dispose of all or any part or parts of the stocks, funds, or securities which for the time being should be vested in them upon any of the trusts of the settlement, and to lay out and invest the moneys to arise by such sale, transfer, or disposition in the purchase of the other moiety of Stanton's Wharf or any less part or share or parts or shares thereof, with power to purchase during the life of Mary Rebecca Pilcher subject to her estate or interest therein under the will of Jeremiah Pilcher, and to cause the same moiety or part or share when purchased to be respectively conveyed and assured unto and to the use of the said trustees for the time being, their heirs and assigns, upon trust nevertheless with the consent in writing of Marie Amelie Pilcher and James Hill or the survivor of them, and, after the decease of such survivor, then at the discretion of the trustees or trustee for the time being, to sell and dispose of the same premises and to stand possessed of and interested in the money to arise by such sale or sales (after payment of the costs, charges, and expenses attending or occasioned by the same sale or sales) upon the same trusts and under and subject to the same powers and provisions as the moneys with which such premises should be purchased were and would have been subject and liable to in case such purchase or purchases had not been made, and also upon trust in the meantime and until the premises which should be so purchased as aforesaid should be resold to apply the annual rents, issues, and profits thereof in the same manner

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as the annual income of the moneys laid out in such purchase or purchases as aforesaid would have been applicable if the same had not been so laid out, it being the intention and meaning of the parties thereto that the premises which should be purchased under that power should for the purposes of the settlement be considered as money, and should be subject in all respects to the same trusts, powers, and provisions as the money laid out in such purchase or purchases as aforesaid would have been subject to if the same had not been so laid out. The settlement contained no other provision for investment of funds in the purchase of land.

Mary Rebecca Pilcher died on July 25, 1885.

Stanton's Wharf had not been sold, and was now let under an agreement for a building lease for forty-two years from June 24, 1894, at a yearly rent of 800*l*.

Stanton's Wharf comprised a quay abutting on the River Thames, with two warehouses immediately adjoining the quay, and an office and yard in the rear of the warehouses, and lying between them and a street. The yard was behind the eastern warehouse, but did not extend the whole length of that warehouse. Immediately adjacent to the yard and warehouse last mentioned, and abutting on the eastern side of the yard and the southern side of the warehouse, there was a small piece of land 500 square yards in extent, belonging to a neighbouring owner. This piece of land comprised, together with the yard, the whole area between the eastern warehouse and the street, and the acquisition of the land as an addition to the Stanton's Wharf property was most desirable. The land could be purchased on advantageous terms, the tenants were willing to accept a lease of it at a proper rent, and it was proposed that the trustees of the settlement, jointly with Mary Jane Pilcher, as the owner of the other moiety of Stanton's Wharf, should purchase the land; but no contract for purchase, conditional or otherwise, had been entered into.

This was a summons by Mrs. Hill (formerly Marie Amelie Pilcher), as plaintiff, against the trustees of the settlement, Mary Jane Pilcher, the Rev. James Hill, and the children of Mr. and Mrs. Hill, as defendants, seeking the opinion or direction

of the Court on various matters connected with the settlement, and in particular asking whether any portion of the trust funds subject to the trusts of the settlement was applicable under the Settled Land Acts or otherwise for the purpose of purchasing, jointly with the defendant Mary Jane Pilcher, the piece of land adjoining Stanton's Wharf above referred to, and that directions might be given as to how such purchase should be effectuated.

Austen-Cartmell, for the plaintiff, the tenant for life. The provision in the settlement empowering the trustees to apply the settled funds in the purchase of the moiety of Stanton's Wharf which is not comprised in the settlement brings the present case within s. 33 (1) of the Settled Land Act, 1882. The section in terms applies to every case where there is money in the hands of trustees of a settlement which is liable to be laid out in the purchase of "land" to be made subject to the settlement; it is not in terms required that the money shall be liable to be laid out in land generally, or in land in England or Wales or elsewhere; and it is therefore sufficient if the money is liable to be laid out in the purchase of particular land, as is the case under this settlement.

[KEKEWICH J. I observe that in Mr. Wolstenholme's book there is this dictum: "The effect of this section is to free all money liable to investment in land from any particular restriction as to the land to be purchased, as, for instance, that it should be in a particular county": Wolstenholme's Conveyancing and Settled Land Acts, 7th ed. p. 344.]

The Legislature, while refraining from conferring any general power to convert personalty into realty, has, on the other hand, provided that, if once an intention is shewn by the settlor that settled money should be converted into realty, that money is to be capable of being applied as capital money for all the purposes of the Act.

(1) Sect. 33 of the Settled Land Act, 1882, is as follows: "Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act."

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Badcock, for the trustees and other defendants. There may be some difficulty by reason of the use of the word "liable" in the section. Mr. Wolstenholme, at p. 343, says this: "'Liable,' i.e. under a positive direction: not under a mere power, like the common power, in a money settlement, to purchase a residence, or to invest in purchase of land." But here the power is not a mere power; it is equivalent to a direction to the trustees, if the tenant for life requests them so to do, to purchase the unsettled moiety, and it therefore imports an obligation which is sufficient to satisfy the word "liable."

KEKEWICH J. The question in this case is whether or not money which trustees of a settlement are empowered to invest, at the request of the tenant for life, in the purchase of particular land, is money which is "liable to be laid out in the purchase of land" within the meaning of s. 33 of the Settled Land Act, 1882; and in considering that question two points are involved, one of which is concerned with the word "liable," and the other with the word "land."

The first point is whether the power contained in this settlement to purchase the unsettled moiety of the land called Stanton's Wharf, at the request of the tenant for life, is a mere discretionary power, or imports an obligation. As I understand the law, where there is a direction or power to trustees to sell or purchase at the request of the tenant for life, that means that if the tenant for life makes the request the trustees must sell or purchase, and not merely that they may do so. In my opinion, under this power, if a fit occasion arose, and there was no objection on the score of price, the tenant for life could in effect insist upon the trustees purchasing the unsettled moiety or any particular part of it; and, consequently, upon the request being made, there would arise a "liability"—that is to say, an obligation on the part of the trustees—to make the purchase.

The second point is whether, as the power or obligation is only to purchase particular land, the money can properly be said to be liable to be laid out in the "purchase of land" within the meaning of the section. It seems to me, on the proper construction of s. 33 of the Settled Land Act, 1882, that where

under a settlement provision is made for the investment of money in land, so as to convert that money from personalty into realty, the intention of the Act is that such money should be capable of being applied as capital money for all the purposes of the Act. I think, therefore, that this case falls within the section, and I shall be prepared to authorize part of the settled personalty being laid out in buying the piece of land in question upon satisfactory conditional agreements for purchase and letting being brought into chambers; and this part of the summons will be adjourned into chambers accordingly.

Solicitors: *S. W. Johnson & Son.*

C. C. M. D.

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Feb. 24, 25; *March* 17, 31.

GRAHAM *v.* DRUMMOND.

[1893 G. 2056.]

Executor-legatee—Equitable Assets—Mortgage—Priorities of Equitable Interests—Notice.

The rule—that a purchaser for value of an asset of the testator, from an executor who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of the testator, if the purchaser took without notice of the unsatisfied debts or of anything which made it improper for the executor so to deal with the asset—applies in the case of equitable as well as legal assets; provided that neither the executor nor the Court administering the testator's estate still retains control over the asset, as, e.g., in *Noble* v. *Brett* (24 Beav. 499) and *Hooper* v. *Smart* (1 Ch. D. 90).

In 1878 the registered holder of railway stocks covenanted to pay an annuity to the trustees of a settlement during the joint lives of himself and his wife and the life of the survivor. In 1882 he died having bequeathed all his property to his widow, and appointed her his executrix. The widow proved the will, and by various deeds from 1886 to 1892 transferred the stocks to her bankers to secure a debt of her own. In December, 1892, the widow gave an equitable charge on the stocks to the plaintiff to secure advances made to her. Neither the bankers nor the plaintiff when taking their respective securities had knowledge or notice that any debt of the testator remained unpaid, or that the widow was not entitled to deal with the stocks as she did, and the plaintiff, before he had notice that there was any indebtedness of the testator, gave notice of his charge to the bankers. The bankers sold the stocks, and, having retained the amount owing to them, paid the balance into court:—

Held, that the plaintiff's charge on the balance had priority over the claims of the settlement trustees.

By a settlement, dated November 13, 1878, on the marriage of one of his daughters, Arthur Henry Champagné covenanted with the trustees of the settlement that he, his heirs, executors or administrators, would, during the lives of himself and his wife Catherine Mary Champagné, and the life of the survivor of them, pay to the trustees the annual sum of 300*l.*

By another settlement, dated August 31, 1882, on the marriage of another daughter, A. H. Champagné entered into a similar covenant with the trustees of that settlement.

A. H. Champagné died on December 9, 1882, having by his will given all his estate and effects to Catherine M. Cham-

pagné for her absolute use and benefit, and appointed her sole executrix. She proved the will in January, 1883.

Part of Champagné's estate consisted of railway stocks standing in his name in the books of the company at the time of his death, shortly after which they were transferred in such books into the name of his widow.

By nine deeds of various dates from July, 1886, to December, 1892, the widow transferred the stocks into the names of G. J. Drummond and E. A. Drummond to secure a debt of her own.

On December 20, 1892, the widow signed and delivered to H. A. Graham a memorandum in writing stating that in consideration of his discounting certain promissory notes she thereby charged to secure repayment thereof "all my securities now in the hands of Messrs. Drummond, bankers, Charing Cross, and now charged to them to secure" a certain sum advanced to her, and agreed on demand to execute in favour of Graham a legal charge upon the securities in the same form, so far as was practicable, as the charge given to Messrs. Drummond, the memorandum in the meantime to be read as if the legal charge had been given in the form aforesaid, and to confer the same rights, powers, and remedies.

Messrs. Drummond and the plaintiff respectively, when they obtained their charges on the stock, had no knowledge or notice that any debt of the testator remained unpaid, or that his widow was not in every respect entitled to deal with the stock as she did.

Graham gave notice of his charge to Messrs. Drummond long before they or he had any notice that any debt of the testator remained unpaid.

The annual sums covenanted to be paid by the testator were paid by his widow down to February, 1893, as to the money payable under one settlement, and down to March, 1893, as to the money payable under the other settlement, and in July, 1893, the widow was adjudicated a bankrupt.

In July and September, 1893, Messrs. Drummond sold the stock, and out of the proceeds they retained the amount of their own secured debt. They paid the balance into court in the action brought by Graham mentioned below.

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In October, 1893, Graham commenced an action which after amendment was against Messrs. Drummond, the trustee in bankruptcy of the testator's widow, C. Owles (who claimed to be a creditor of the widow and to have a charge on the stock), and G. Philips, V. H. Close, and D. R. Lowe, who were the trustees of the two settlements. Graham claimed a declaration that he was entitled under his memorandum to a charge upon the stock and the proceeds of sale thereof; an account of the proceeds of sale and the balance, and payment of such balance, and other relief.

Philips, Close, and Lowe counter-claimed for a declaration that the funds in court formed part of the estate of the testator available to pay the debts due to those defendants under the settlements in priority to any claim thereon by the plaintiff Graham, and claimed as creditors to have the fund in court transferred to the credit of another action in which the testator's estate was being administered.

The action was tried before Romer J. on February 24 and 25, and March 17, 1896.

Neville, Q.C., A. àB. Terrell, and *B. A. Hall,* for the plaintiff. An executor, who is also residuary legatee, can give a good title to a mortgagee or other purchaser for value of the assets of the testator, and unless there is ground for suspicion of collusion between them the transaction is good: *Mead* v. *Lord Orrery* (1); *Taner* v. *Ivie* (2); *M'Leod* v. *Drummond* (3); *Taylor* v. *Hawkins.* (4)

The fact that the executor is also residuary legatee does not per se limit the title of the purchaser to the beneficial interest of the legatee, although if the purchaser had reason to suspect that a devastavit was being committed his title would be so limited.

If an executor disposes of assets, whether legal or equitable, for valuable consideration, the creditors cannot follow the assets into the hands of the purchaser: *Nugent* v. *Gifford.* (5)

(1) 3 Atk. 235.
(2) 2 Ves. Sen. 466.
(3) 14 Ves. 353; 17 Ves. 152.
(4) 8 Ves. 209.
(5) 1 Atk. 463.

In that case the term was equitable, and although the fact does not appear in the report the executor was residuary legatee: *M'Leod* v. *Drummond.* (1)

Where there is gross negligence, although not direct fraud, the assets may be followed: *Hill* v. *Simpson.* (2)

Although the plaintiff in this case was only an equitable incumbrancer, he gave notice of his charge to the legal owner long before the latter had any notice of the claims of the settlement trustees.

Eve, Q.C., and *R. J. Parker*, for the defendants Philips, Close, and Lowe. Where the assets are equitable, priority of notice does not give priority of title; and the plaintiff having only an equitable title, his title cannot prevail over the prior equitable title of the settlement trustees. They are therefore entitled to follow the assets to the exclusion of the plaintiff. The cases cited by the plaintiff relate to specific legacies of leaseholds to executors. Even in an administration suit where all the certified debts had been paid and the Court had declared residuary legatees entitled subject to an annuity, and to provide for the annuity a fund was retained in court, creditors afterwards establishing their claim in another suit were held entitled to the fund in priority to the residuary legatees and their assignees for value: *Hooper* v. *Smart* (3); and where under directions in a will the executors transferred legacies into the joint names of themselves and infant legatees, and paid over the residue, and ten years afterwards debts, previously unknown, were established against the estate, the residuary legatee being insolvent and the legacies still in the joint names, it was held that the legacies were liable to pay the debts, as against both the legatees and a purchaser: *Noble* v. *Brett.* (4)

[ROMER J. referred to *Dilkes* v. *Broadmead.* (5)]

In that case purchasers for value, without notice, had had the assets handed over to them.

The equity of the estate prevails over that of a chargee from the executor even where the latter is ignorant when he takes

(1) 17 Ves. 152, 163.
(2) 7 Ves. 152.
(3) 1 Ch. D. 90.
(4) 24 Beav. 499.
(5) 2 Giff. 113; on appeal, 2 D. F. & J. 566.

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his charge that the incumbrancer holds as executor: *In re Morgan*. (1)

The assent of the executor has not the same effect in the case of a residuary gift that it has when given to a specific legacy.

Persons dealing with an executor are put on inquiry when he is ostensibly acting as owner of the assets charged: *Ricketts* v. *Lewis*. (2) In that case the title of legatees prevailed, and creditors are not in a worse position than volunteers.

The notice given by the plaintiff does not better his title. When a cestui que trust assigns his interest in the fund for value and the purchaser neglects to give notice to the trustees, and afterwards the same cestui que trust assigns to another person who has no notice of the prior assignment and gives notice to the trustees, the second purchaser has the better title: *Dearle* v. *Hall*. (3) But that rule does not apply as between persons claiming under different assignors: *In re Richards*. (4)

The notice to be good should have been given to the debtor, not to the owner of the debt: *Société Générale de Paris* v. *Walker*. (5)

Even if the rule in *Dearle* v. *Hall* (3) did apply, it would not avail the plaintiff, for the testator and his widow were aware of the covenants given to the trustees of the settlement and of the claims under them. The equities of the trustees attached to the fund and were not affected by the transfer of it: *Ward* v. *Duncombe* (6); *Feltham* v. *Clark*. (7)

E. U. Bullen, for the defendant Owles.

Neville, *Q.C.*, in reply. The executor could deal with both legal and equitable assets, and the suggested distinction between them as regards his power over them does not exist.

The plaintiff did everything that could be done to obtain a good charge, having regard to the fact that the stock had been transferred to the first mortgagees.

If the trustees were right in their contention, no one could safely deal with an executor-legatee until all the testator's debts

(1) 18 Ch. D. 93.
(2) 20 Ch. D. 745.
(3) 3 Russ. 1.
(4) 45 Ch. D. 589.
(5) 11 App. Cas. 20.
(6) [1893] A. C. 369, 375, 376.
(7) 1 De G. & Sm. 307.

were statute-barred. *Hooper* v. *Smart* (1) and *Noble* v. *Brett* (2) were decided on the principle that creditors can come at any time while the Court has control of funds in administration proceedings. In *In re Morgan* (3) the lease equitably charged had been taken on the surrender of a previous lease which the incumbrancer held as executor. The new lease was pledged to secure the executor's own debt, and the legal title was not in the trustees.

Where the equities are equal, priority of incumbrances depends on notice, and not on the dates of the creation of the incumbrances.

The fact that the first mortgagees were the registered holders of the shares is sufficient to make *Société Générale de Paris* v. *Walker* (4) distinguishable. In *Feltham* v. *Clark* (5) it was only held that, the property being in transitu, a prior equitable mortgagee who had done all that was possible to obtain possession was entitled to priority over a subsequent mortgagee who had given notice to the consignee of the cargo, in whom the property was not. The trustees were not creditors at the time when the plaintiff's charge was created; for no sum was then due and payable to them under the covenants: *In re Hargreaves*. (6)

March 31. ROMER J. The point of law which I have to consider arises under the following circumstances. Mrs. Champagné was sole executrix and legatee under her husband's will. Several years after his death, in order to secure a debt of her own to Messrs. Drummond, she transferred certain railway stocks forming part of his estate into their names. Subsequently, in order to secure a liability of her own, she gave a charge on the stocks in favour of the plaintiff. Messrs. Drummond and the plaintiff respectively, when they obtained their charges on the stocks, had no knowledge or notice that any debt of the husband remained unpaid or that Mrs. Champagné was not in every respect entitled to deal with the stocks as she

(1) 1 Ch. D. 90.
(2) 24 Beav. 499.
(3) 18 Ch. D. 93.
(4) 11 App. Cas. 20.
(5) 1 De G. & Sm. 307.
(6) 44 Ch. D. 236.

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did. The plaintiff gave notice of his charge to Messrs. Drummond long before they or he had any notice that any debt of the husband remained unpaid. This is an action by the plaintiff to enforce his security. Messrs. Drummond have sold the stocks, and, after paying out of the proceeds their own secured debt, have paid the balance into court in this action. It now appears that the defendants, Philips, Close, and Lowe, as trustees of a certain marriage settlement, were unsatisfied creditors of the husband, and they claim as such creditors to have a right to the fund in court superior to the plaintiff's claim, and to have that fund transferred to the credit of another action in the Chancery Division in which the estate of the husband is being administered by the Court. The question before me is whether, under the circumstances above stated, this claim of the trustees is well founded. In my opinion it is not, and for the following reasons. I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. The cases shewing this are numerous and of long standing. In the first place, there are two decisions of Lord Hardwicke. The first of these is *Nugent* v. *Gifford*. (1) To understand that case a fact must be borne in mind which does not appear in the report in 1 Atkyns, namely, that the executor was also sole residuary legatee. This fact appears in a statement in 4 Bro. C. C., 136, and is mentioned by Lord Eldon in *M'Leod* v. *Drummond*. (2) The second case is *Mead* v. *Lord Orrery* (3), and the real ground on which it was decided and is to be supported was that one of the three executors there dealing with the asset was one of the residuary legatees, and that the person dealing in good faith with them was entitled to assume that the executors assented to that asset being treated as part of the residuary share of the legatee. These cases were followed by Sir William Grant M.R. in *Taylor* v. *Hawkins* (4),

(1) 1 Atk. 463.
(2) 17 Ves. 163.
(3) 3 Atk. 235.
(4) 8 Ves. 209.

where he pointed out the necessity that the assignee or mortgagee of the asset should have no express notice of the existence of unsatisfied debts of the testator. And the principle has been recognised and followed in *Whale* v. *Booth* (1) and *Storry* v. *Walsh* (2), and has been stated for a considerable time as established law in leading text-books dealing with the subject.

But it is now said on behalf of the creditors here that the principle of law I have stated is limited to cases where the assignee or mortgagee of the asset obtains the legal estate in or legal control over that asset. It is said that where the assignment or mortgage only confers an equitable interest in the asset, then that equitable interest is subject to the prior equitable right of the unsatisfied creditors, and, of course, if this contention were correct, then the principle could never apply to any equitable asset. Now I cannot find that up to the present time it has ever been contended or suggested that the principle is so limited, and I do not think it ought to be. In the reported cases the question whether the asset was equitable, or whether the purchaser or mortgagee had acquired a legal estate or its equivalent in the case of chattels personal, has never been treated or referred to as being important. And, so far as authority goes, it is against the limitation contended for, inasmuch as *Nugent* v. *Gifford* (3) was a case where the asset was an equitable and not a legal term of years. And in *M'Leod* v. *Drummond* (4) Sir William Grant M.R., though he was there dealing with the ordinary case of executors borrowing money on the security of their testator's assets, makes the following general remarks: "I do not find that any difference has been made between the power of an executor to dispose in any manner of equitable assets, and his power to dispose of legal assets. In the case of *Nugent* v. *Gifford* (3) it was only the equitable, and not the legal, term, that the executor had assigned in payment of a debt of his own; and in *Scott* v. *Tyler* (5) the bonds, though capable of assignment, were not in fact assigned; and therefore the bankers had not the legal

(1) 4 T. R. 625, n. *a*.
(2) 18 Beav. 559.
(3) 1 Atk. 463.
(4) 14 Ves. 360.
(5) 2 Bro. C. C. 431; 2 Dick. 712.

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interest: yet it was held, that the pledge could be taken from them only upon the ground of implied fraud." Moreover, the reasons given by the judges for the decisions I have above referred to apply equally to legal and equitable assets.

The chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration, and I do not find that this immunity on the part of the purchasers is limited to cases of legal assets, or to cases where the purchasers have obtained the legal estate or its equivalent, and in my judgment it ought not to be so limited.

But, in order to prevent misunderstanding, I desire to point out that the cases I have been considering must not be confused with those where an executor has not so far parted with his control over the asset as to prevent his having recourse to it in order to satisfy creditors subsequently appearing. If the executors could have recourse to the asset, so, of course, could the unsatisfied creditors. So, if the Court, administering the testator's estate, retains the control over an asset, it can apply it in favour of creditors at any time, notwithstanding that the legatee of the asset may have dealt with it for valuable consideration. For in cases of this class the title acquired by the purchaser from the legatee is really one subject to the right of

the executor, or of the Court, as the case may be, to have the asset applied in satisfaction of any creditors who may appear at any time before the executor or Court loses control over it.

In the case now before me, Mrs. Champagné, as against the plaintiff, could not possibly have said she retained the right to disregard the charge she had given, and to have the assets charged applied in payment of the unsatisfied creditors. The plaintiff's charge was in no way subject to any right of or control by the executrix. The stocks charged were transferred to the first mortgagees, who admittedly got a title, and, as stated before, notice of the plaintiff's charge was given to them before they had any notice of the existence of the creditors now claiming. The plaintiff, in fact, completed his title by giving notice to those having legal control over the assets, and the stocks could, as against him, in no way be reached by the executrix or by the creditors.

For these reasons I think the plaintiff is entitled to the relief he asks. But before parting with the case I ought to say a few words about the authorities cited on behalf of the creditors. *Noble* v. *Brett* (1) was a case where the Court held that the executor had not parted with his control over the asset and had retained his right to have recourse to it to satisfy the unsatisfied creditor, and, further, that the asset had come under the control of the Court for the purpose of administering the estate of the testator. That these were the grounds of the decision is shewn by the passages in the judgment of Sir John Romilly M.R. (2) *Hooper* v. *Smart* (3) was a case where the fund was in the control of the Court in an action administering the estate of the testator, and was subject to the right of the Court to apply it in payment of any creditor who established his claim before it was paid out, and where, though all known debts of the testator had been paid, the purchasers from the legatees had bought subject to the Court's right, as was pointed out by Hall V.-C. in these words (4): "This fund remains in court, and the purchasers took subject to the risk that other claims might be brought in and established."

(1) 24 Beav. 499.
(2) Ibid. 510, 511, 512.
(3) 1 Ch. D. 90.
(4) Ibid. 98.

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Lastly, *In re Morgan* (1) has no real bearing on the point now before me. That was the case where an executor and trustee held a lease in trust for certain beneficiaries under a will and renewed that lease. Of course he held the renewed lease as trustee. He then, concealing the fact that he was only a trustee of the renewed lease, gave an equitable charge on it in favour of a third person, and it was held under these circumstances, that that third person's charge could not be set up as against the prior equity of the beneficiaries.

Solicitors for plaintiff: *Gibson, Weldon & Bilbrough.*
Solicitors for defendants: *Lowe & Co.; S. P. Clare.*

F. E.

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April 17.

In re PANTHER LEAD COMPANY.

[0044 of 1896.]

Company — Winding-up — Creditor — Proof by Lessor — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 158—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

Since the decision of the House of Lords in *Hardy* v. *Fothergill* (13 App. Cas. 351) the old cases as to proofs in the winding up of insolvent companies, in respect of their liabilities under leases, require reconsideration; and it is the duty of the Court to assist a lessor in proving in respect of an insolvent company's obligation as lessee, where he desires to prove at once for his loss on the footing of the lease being treated as determined.

Semble, that proof may at once be made in respect of all liabilities —present or future, certain or contingent—of the company as lessee.

In re New Oriental Bank Corporation (*No.* 2) ([1895] 1 Ch. 753) distinguished.

By a lease dated December 20, 1883, Sir Rupert Alfred Kettle and others demised a piece of land in the city of Bristol and certain smelting works thereon to the Panther Lead Company, Limited, their successors and assigns, for the term of twenty-one years from December 25, 1883, determinable nevertheless as thereinafter mentioned, at the yearly rent of 400*l.* during the first seven years of the term, of 450*l.* during the next seven years, and of 500*l.* during the remainder of the term. The

(1) 18 Ch. D. 93.

company covenanted to pay the rents, rates, and taxes, and to keep the demised premises in repair, and deliver them up in good repair at the expiration or other sooner determination of the term. The lease also contained the following clause :—

"Provided also that if the lessees, their successors or assigns, shall be desirous of determining this demise at the end of the first seven or fourteen years of the said term, and of such desire shall give to the lessors, their heirs or assigns, six calendar months' notice in writing previous to the expiration of the said first seven or fourteen years (the rents, covenants, and conditions hereinbefore respectively reserved and contained on the part of the lessees, their successors or assigns, to be respectively paid, performed, and observed being paid, observed, and performed), this demise shall determine accordingly at the expiration of the said term of seven or fourteen years, as the case may be, previous to which such notice as aforesaid shall have been given as aforesaid."

On January 28, 1895, the company passed an extraordinary resolution for voluntary winding-up. The liquidator realized the assets other than the demised premises, and paid the creditors a dividend of 5*s.* in the pound on such of the debts as he had admitted. The demised premises were in the beneficial occupation of the liquidator down to November 11, 1895, when he delivered the keys of the premises to the lessors' agents, who accepted possession without prejudice to the question as to the lessors' rights under the lease. The lessors were unable to let any part of the premises, and the same remained vacant and unproductive down to the hearing of the summons mentioned below, at which Romer J. held that the case came within *Oastler* v. *Henderson* (1), and not *Phenè* v. *Popplewell* (2), and that there had been no acceptance of possession in the sense that the term or the liability of the company under the lease was to be ended, or so as to constitute a surrender by operation of law.

The liquidator paid the lessors the rent in full for the period between the passing of the extraordinary resolution and November 11, 1895, and paid them the dividend of 5*s.* in the pound on arrears of rent due before the winding-up.

(1) 2 Q. B. D. 575. (2) 12 C. B. (N.S.) 334.

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The lessors claimed to prove in respect of the liabilities of the company under the lease down to the end of the term of twenty-one years, and to have the amount of the liabilities ascertained, and to be admitted as creditors for and be paid a dividend on the amount so ascertained.

The liquidator was unable to close the liquidation while the question what proof by the lessors should be admitted remained open, and he therefore took out a summons under s. 138 of the Companies Act, 1862, for the determination of the question whether the lessors were entitled to prove as creditors for any and what sum in respect of rent under the lease for any and what period subsequent to November 11, 1895, or in respect of any breaches of the covenants in the lease to happen after that day in respect of the demised premises, or to have any and what part of the assets of the company applied or impounded in satisfaction of or to answer any other right or claim of the lessors in respect of the premises.

The summons was adjourned into court and heard by Romer J. on March 13, 16, and 23, 1896.

Eve, Q.C., and *J. G. Wood*, for the liquidator. The company being insolvent, the lessors say that the rule in bankruptcy as to proving in respect of future and contingent liabilities applies, and that the case is governed by *Hardy* v. *Fothergill*. (1) But Vaughan Williams J. has recently held that the rule laid down in *Hardy* v. *Fothergill* (1) does not apply where a lessor is proving in respect of the liability of his lessee under a subsisting lease, whether the lessee is an insolvent company which is being wound up, or is a bankrupt, and that *In re Haytor Granite Co.* (2) and *Horsey's Claim* (3) are still applicable in the case of an insolvent company in liquidation: *In re New Oriental Bank Corporation* (*No.* 2). (4)

Buckley, Q.C., and *P. S. Stokes*, for the lessors. *In re Haytor Granite Co.* (2) was decided in 1865, and therefore before the passing of the Bankruptcy Act, 1869. In that case Sir J. Romilly M.R. had decided that a lessor who had granted a lease to a company was entitled to prove for the rent due

(1) 13 App. Cas. 351.
(2) L. R. 1 Ch. 77.
(3) L. R. 5 Eq. 561.
(4) [1895] 1 Ch. 753.

up to date, but could not enter a claim under s. 158 of the Companies Act, 1862, in respect of future rent (1); but the Lords Justices held that the lessor was entitled to enter a claim for the whole amount at which the future rent was estimated, and that the company was not to be dissolved without notice to the lessor. In *Horsey's Claim* (2), which was decided in 1868, the question was raised as to what could be done with a claim of the same kind which had in that case been entered. Afterwards a dividend was paid, and Giffard V.-C. held that the lessor was not entitled to have a sum equal to the dividend on the amount at which the future rent was estimated impounded; and he dismissed a summons for that purpose without prejudice to any application at any time in respect of any rent actually due and unpaid, or any application to be made in case of any return of assets to the shareholders being asked for.

There were other cases on the same question, e.g., *Gooch* v. *London Banking Association* (3), the result of the decisions being that the lessor could prevent the assets of the company from being distributed among its shareholders unless sufficient assets were set aside to provide for future rent and other liabilities under the lease.

Sect. 31 of the Bankruptcy Act, 1869, provided that, with certain exceptions, "all debts and liabilities, present or future, certain or contingent," should be deemed to be debts provable in bankruptcy.

In *Hardy* v. *Fothergill* (4) the assignee of a lease had covenanted to indemnify the lessees against damages for breaches of covenants in the lease, and before the lease expired the assignee became bankrupt and obtained his order of discharge. The lessees did not prove in respect of the possible liability under the covenant to indemnify, and after the term expired had to pay damages for breach of the covenants in the lease. They then claimed an indemnity from the assignee; but it was held that—as their claim in respect of future and contingent liability was provable in his bankruptcy—they were barred by

(1) L. R. 1 Eq. 11.
(2) L. R. 5 Eq. 561.
(3) 32 Ch. D. 41.
(4) 13 App. Cas. 351.

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the order of discharge. It is true that the claim was not under the covenants in the lease, but it was in respect of a covenant to indemnify against future and contingent liability under a lease. The observations of the Earl of Selborne (1) and of Lord Macnaghten (2) shew how widely s. 31 of the Bankruptcy Act, 1869, was to be construed, and that the mere fact that there were difficulties in estimating or valuing the amount of a future or contingent liability would not prevent a claim from being provable. It is no more difficult to estimate the future liabilities under a lease than it is to estimate those which arise under a covenant of indemnity against future liabilities under a lease: both liabilities are provable in bankruptcy. Sect. 10 of the Judicature Act, 1875, provides that in the winding up of a company "whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up" the same rules shall prevail as to "debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy." In s. 37 of the Bankruptcy Act, 1883, there is a provision similar to that in the Act of 1869 as to "debts and liabilities, present or future, certain or contingent," being provable in bankruptcy.

In *Craig's Claim* (3) a lease had been assigned to a company, and the lessee applied in its subsequent liquidation to have a sum provided to meet his contingent liability under the lease, the company having given him a covenant of indemnity. It was held that he was bound by a scheme of arrangement under the Act of 1870. *Horsey's Claim* (4), *In re Haytor Granite Co.* (5), and *Hardy* v. *Fothergill* (6) were all cited and discussed, and in delivering the judgment of the Court of Appeal Lindley L.J., after referring to the decision in *Horsey's Claim* (4), said (7): "This view prevailed until a comparatively recent date. But after the decision of the House of Lords in the case of *Hardy* v. *Fothergill* (6), which must be considered in connection with s. 10 of the Judicature Act, 1875, it is

(1) 13 App. Cas. 360, 361.
(2) Ibid. 368.
(3) [1895] 1 Ch. 267.
(4) L. R. 5 Eq. 561.
(5) L. R. 1 Ch. 77.
(6) 13 App. Cas. 351.
(7) [1895] 1 Ch. 275.

difficult, if not impossible, to say that Mr. Craig" (the lessee) "could not have had his claim valued and have proved for its value." The Court abstained, however, from saying what the effect of *Hardy* v. *Fothergill* (1) was on the right of a lessor to have the assets of a lessee company in winding-up impounded. In that state of the law *In re New Oriental Bank Corporation* (*No.* 2) (2) came before Vaughan Williams J. In that case possession had been accepted by the lessors without prejudice to their rights in respect of future liabilities of the company under the lease. The lease could be determined at the end of the first seven years, but only on the conditions that the company's obligations under it had been performed. The liquidator's counsel, relying on the bankruptcy case of *Ex parte Blake* (3), said the right of the lessee to determine the lease before the end of the full term must be taken into account in determining what amount was to be proved for, but the lessors' counsel pointed out that the condition as to shortening the term had not been complied with, and that a liquidator could not disclaim a lease as a trustee in bankruptcy could, and that if the lessors proved it must be on the footing that the lease was treated as being at an end, whereas the Court had to deal with the case of an actually subsisting lease. The lessors were not there claiming to prove for the future liabilities—a lessor is in the position of a secured creditor, and is not bound to give up his security—but where he claims to prove his case is within *Hardy* v. *Fothergill*. (1) Vaughan Williams J. said that *Hardy* v. *Fothergill* (1) did not apply to a lessor's proof in respect of an existing lease. The lessors in this case, however, are willing to prove on the footing that the lease is put an end to.

J. G. Wood, in reply. The lessor's counsel have failed to distinguish *In re New Oriental Bank Corporation* (*No.* 2). (2) Sect. 10 of the Judicature Act, 1875, does not apply to future obligations of a company in liquidation under covenants in a lease: *In re Westbourne Grove Drapery Co.* (4)

[ROMER J. referred to *Macfarlane's Claim*. (5)]

(1) 13 App. Cas. 351.
(2) [1895] 1 Ch. 753.
(3) 11 Ch. D. 572.
(4) 5 Ch. D. 248.
(5) 17 Ch. D. 337.

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The liabilities under the lease will be provable in the winding-up, but are not provable at the present moment. *Horsey's Claim* (1) is still law. In *Hardy* v. *Fothergill* (2) the claim was for a debt; it was not under a lease. *Craig's Claim* (3) does not apply, for it was not shewn there that the company was insolvent. The Court is bound by cases deciding that there is no such right of proof as that now set up.

April 17. ROMER J. In this case I have already held that the lease to the company has not been surrendered by operation of law, and now the question arises as to what ought to be done in the winding-up with regard to the claim of the lessors in respect of the lease. The lease is an onerous one. The premises are not occupied or used or required by the liquidator or the company. If the liquidator can make a proper arrangement with the lessors whereby the lease may be determined he certainly ought to do so. On the other hand, it is equally obvious that the terms of the lease are beneficial to the lessors, and that if the lease were put an end to without due compensation to the lessors they would suffer damage.

Now, if in this case, as in that of *In re New Oriental Bank Corporation* (*No.* 2) (4), before Vaughan Williams J., the lessors had refused to let the lease be given up and prove for the loss thereby sustained by them, I should have felt great difficulty in doing more than was done by the learned judge in that case, for a lessor cannot be compelled to come in and prove. But here the lessors offer to arrange with the liquidator to take a surrender of the lease, or to determine it, on terms of their being allowed to prove for the loss thereby sustained by them. This is clearly an arrangement which ought to be made by the liquidator on his side; and after the expression of my opinion I have no doubt he will enter into it, and so all difficulty will be avoided. All I need do, therefore, on this summons is to give liberty to the liquidator to carry out the arrangement I have indicated. Should, for any unforeseen reason, any difficulty arise, then a further application to the Court can be

(1) L. R. 5 Eq. 561.
(2) 13 App. Cas. 351.
(3) [1895] 1 Ch. 267.
(4) Ibid. 753.

made. The costs of both parties of this application will be paid by the liquidator out of the assets.

I desire to add that, in my opinion, since the decision in *Hardy* v. *Fothergill* (1), the old cases as to proof by a lessor to a company in liquidation have to be reconsidered, as was pointed out by Lindley L.J. in *Craig's Claim* (2); and certainly it will be the duty of the Court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined. In such cases I see no difficulty in allowing the proof or estimating its amount.

And I need not point out the injustice that would ensue if a liquidator in the case of an insolvent company like the present was to be at liberty to refuse to allow any proof except for rent actually accrued due. He might apply all the assets in paying the other creditors large dividends on their debts, and leave the unfortunate lessor with a mere claim for his future rent, and in the position of there being no assets available for payment of any part of such rent as and when it accrued due and became provable.

[By consent the question of the amount of damages was referred to chambers.]

Solicitors for liquidator: *Coode, Kingdon & Cotton, for Coode, Shilson & Co., St. Austell.*

Solicitors for lessors: *Emmet & Co., for Kettle & Landor, Wolverhampton.*

(1) 13 App. Cas. 351.

(2) [1895] 1 Ch. 275.

F. E.

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The mortgagees neither attended the creditors' meeting nor assented to the scheme of composition.

Default was made in payment of the instalments. A. died two months after the expiration of the year, and this action was commenced by a creditor for the administration of his estate, which proved to be insolvent.

The mortgagees valued their security at 1500*l.*, and claimed to be admitted as creditors in the action for 500*l.*, the balance of their debt. Their proof had been admitted by the trustee under the composition deed:—*Held*, that the Court of Bankruptcy had jurisdiction to proceed in the bankruptcy of A. under s. 108 and s. 18, sub-s. 11, of the Bankruptcy Act, 1883, notwithstanding his death, and that the strict course would be to allow the applicants to take proceedings in that Court, but the plaintiff having submitted, in order to save delay and expense, to abide by the judgment of this Court on what would be the result of those proceedings, the claim was admitted. *In re* HARDY. HARDY *v.* FARMER - - 904

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BUILDING ESTATE—*Restrictive Covenants as to Trade and Minimum Value of Houses—Subscheme of part of Estate—Restrictive Covenants modified—Noxious or Offensive Trades—Alteration in Character of Estate—Laundry—Acquiescence—Injunction.*] In 1852 a building estate was laid out in lots for private residences and put up for sale by public auction, subject to conditions which prohibited any trade or business on any lot, and required that on certain lots the value of a single house should be not less than 600*l.*, and of a pair of semi-detached villas should be not less than 900*l.* A. bought lot 49 at the sale, and covenanted with the vendor in the terms of the conditions, but qualified by the words "without the previous consent in writing of the vendor, his heirs, appointees, or assigns." In 1881 K. acquired part of lot 49 with notice of the original conditions and of the qualified covenant, and he built a house of more than the covenanted value.—In 1853 the lots unsold at the auction were sold and conveyed by the same vendor subject to the same conditions to B. and P., and they entered into an absolute covenant in the terms of the original conditions. B. and P. then subdivided their purchase into numerous small lots and sold them subject to conditions which required each purchaser to execute a deed of covenant with them containing provisions to keep up the residential character of the estate, and based in the main on the original conditions, but modified to this extent, that no trade or business was to be carried on upon any lot which should be "noisy, noxious, dangerous, or offensive to the neighbourhood or to the owners or occupiers of any of the land, or in anywise injurious to the same land or any part thereof." W. bought some lots of B. and P. with notice of the original restrictions and signed the deed of covenant, and he built a house of more than the covenanted value. One T. also bought two lots of B. and P.

BUILDING ESTATE—*continued.*
with notice of the original restrictions and signed the deed of covenant, and in 1893 these two lots were acquired by S. with the like notice. S. planned a pair of semi-detached villas which together were worth 900*l.*, but each by itself was of less value than 600*l.* He built one of them, and at the rear thereof erected a building and commenced to carry on a public laundry.—K. and W. brought an action against S. to restrain him from carrying on any trade or business, or in the alternative, from carrying on the laundry as being a breach of the modified restriction against trade in the deed of covenant. They also claimed an injunction to restrain S. from building on his land in breach of the covenant as to value. There was evidence that, on the part of the estate where S. was, some of the houses had for some time been let in tenements at weekly rents, and that for a considerable period the owners and occupiers of several of the houses had been carrying on trades or businesses, particularly laundry businesses, but in such a quiet, unobtrusive and restricted manner as not to attract the attention of K. or W. or other passers-by:—*Held*, that the qualified covenant in A.'s conveyance did not preclude K. from insisting on the original conditions, that he had not acquiesced in the breaches that had been committed, and that there had not been such a departure from the original scheme, nor change in the original residential character of the estate, as rendered it inequitable for K. to enforce the original conditions.

But *held*, that W. could not enforce the original scheme but only the modified provisions of B. and P.'s sub-scheme, and that under the circumstances the laundry was not a breach of the modified restriction against trade in the deed of covenant:—

Held also, that S. had not broken the condition as to value merely by building in the first instance one of the pair of semi-detached villas.

But, *semble*, he was bound to erect the companion villa within a reasonable time; and *quære*, how much longer could it remain unbuilt without a breach of the condition being committed. KNIGHT *v.* SIMMONDS - - 653

BUILDING SOCIETY—*Dissolution, Instrument of —Signature—Agent—Infant—Joint Shareholder —Building Societies Act*, 1874 (37 & 38 *Vict.* c. 42), *s.* 32, *sub-s.* 3; 38, 39—*Secretary of State's Regulations*, 1884, *rr.* 13, 14.] The signature of a member of a building society to one only of the two duplicate instruments of dissolution is inoperative.

An infant member of a building society can consent to dissolution of the society: and the consent of a principal to such a dissolution may be signed by an agent on his behalf.

For the purpose of consenting to dissolution of a building society joint holders of a share are to be considered one member, and must all sign the instrument of dissolution.

A member of a building society who holds shares both jointly and severally need not sign the instrument of dissolution in more than one place to testify consent in respect of all his shares. DENNISON *v.* JEFFS - - - - 611

2. —— *Withdrawals — Priorities —Building Societies Act*, 1874 (37 & 38 *Vict.* c. 42), *s.* 32.] The question whether an investing member of a building society may withdraw so as to obtain priority over other members does not depend on the answer to be given to the question whether the society was solvent or insolvent when his notice matured, or on the answer to be given to the question whether the members or officers of the society then knew that the society was insolvent. The line is to be drawn at the time when there is a stoppage of the society's business, or a recognition, by those who are entitled to form a judgment, that the business must be stopped. *In re* AMBITION INVESTMENT BUILDING SOCIETY - - - - - - 89

BURIAL GROUND — *Building upon Disused Burial Ground—Sale or Disposition "under the authority of any Act of Parliament"—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*), *ss.* 80–85, 96—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict.* c. 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict.* c. 72), *ss.* 3, 5—*Open Spaces Act*, 1887 (50 & 51 *Vict.* c. 32), *s.* 4.] In 1885 land forming part of a disused burial ground, building upon which, except for the purpose of enlarging places of worship, is prohibited by s. 3 of the Disused Burial Grounds Act, 1884, was acquired by the Commissioners of Sewers for the City of London under the powers of 57 Geo. 3, c. xxix., for the purpose of street improvements. A portion of the land so acquired was afterwards resold by the commissioners as surplus land to the defendants, a body of charity trustees, who, with the consent of the Charity Commissioners, let it for general building purposes.—In an action for an injunction to restrain the defendants from building upon the land:—*Held*, that it had been "sold under the authority of an Act of Parliament" within s. 5 of the Act of 1884, and consequently was excepted from the operation of that Act.—Sect. 5 applies to a sale or disposition made after the commencement of the Act.—*In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract* ([1895] 1 Ch. 702) preferred upon this point to *In re Trustees of St. Saviour's Rectory and Oyler* (31 Ch. D. 412). ATTORNEY-GENERAL *v.* TRUSTEES OF THE LONDON PAROCHIAL CHARITIES - - - 541

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—— *Cropper* v. *Smith* (26 Ch. D. 700; 10 App. Cas. 249) observed upon - **108**
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—— *Crowther, In re* ([1895] 2 Ch. 56) considered
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—— *Dale* v. *Martin* (9 L. R. Ir. 498; 11 L. R. Ir. 371) approved - - - **397**
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—— *Davidson's Settlement Trusts, In re* (L. R. 15 Eq. 383) followed - - **175**
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—— *Earnshaw-Wall, In re* ([1894] 3 Ch. 156) approved - - - - **480**
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—— *Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract, In re* ([1895] 1 Ch. 702) followed - **541**
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—— *Eyre* v. *Cox* (24 W. R. 317) explained **628**
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—— *Farnham, In re* ([1895] 2 Ch. 806) explained
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—— *Farrar* v. *Farrar's, Limited* (40 Ch. D. 395) explained - - - - **762**
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—— *Fox, In re* (33 Ch. D. 37) explained - **468**
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—— *Hardy* v. *Fothergill* (13 App. Cas. 351) referred to - - - - **978**
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—— *Harrison, In re* (32 Ch. D. 395) considered
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—— *Hartley* v. *Gilbert* (13 Sim. 596) explained
See SOLICITOR. 1. **536**

—— *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (14 App. Cas. 550) applied - **142**
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—— *Hobbs* v. *Midland Ry. Co.* (20 Ch. D. 418) discussed - - - - **121**
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—— *Hooper* v. *Smart* (1 Ch. D. 90) referred to
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—— *Kemp's Settled Estates, In re* (24 Ch. D. 485) observed upon - - - **288**
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—— *Lechmere and Lloyd, In re* (18 Ch. D. 524) distinguished - - - **272**
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—— *London and General Bank, In re* ([1895] 2 Ch. 166), followed - - **6**
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—— *Martin* v. *Porter* (5 M. & W. 351) applicable
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—— *New Oriental Bank Corporation (No. 2), In re* ([1895] 1 Ch. 753) distinguished
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—— *Newton's Trusts, In re* (23 Ch. D. 181) overruled - - - - **573**
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—— *Noble* v. *Brett* (24 Beav. 499) referred to **968**
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—— *Phillips* v. *Homfray* (L. R. 6 Ch. 770) applicable - - - - **894**
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—— *Powell* v. *Matthews* (1 Jur. (N.S.) 973) followed - - - - **549**
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—— *Powerscourt* v. *Powerscourt* (1 Molloy, 616) followed - - - - **50**
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—— *Radcliffe, In re* ([1892] 1 Ch. 227) discussed and applied - - - - **250**
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—— *Reeve* v. *Berridge* (20 Q. B. D. 523) explained - - - - **637**
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—— *St. Saviour's Rectory (Trustees of) and Oyler, In re* (31 Ch. D. 412) not followed **541**
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—— *Shirley* v. *Earl Ferrers* (1 Ph. 167) distinguished - - - - **855**
See REVENUE. 4.

—— *Smith* v. *Houblon* (26 Beav. 482) discussed and applied - - - - **250**
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—— *Standard Manufacturing Co., In re* ([1891] 1 Ch. 627) distinguished - - **187**
See DEBENTURES.

—— *Stewart, In re* (41 Ch. D. 494) approved **480**
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—— *Street* v. *Gover* (2 Q. B. D. 498) followed **19**
See PRACTICE. 5.

—— *Toke* v. *Andrews* (8 Q. B. D. 428) distinguished - - - - **19**
See PRACTICE. 5.

—— *Toulmin* v. *Steere* (3 Mer. 210) questioned
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—— *Van Horne* v. *Fonda* (5 Johns. Ch. (N.Y.) 388) not followed - - - **762**
See MORTGAGE. 3.

—— *Walmsley* v. *White* (40 W. R. 675) followed
See PARTNERSHIP. 2. **166**

—— *Zierenberg* v. *Labouchere* ([1893] 2 Q. B. 189) dictum explained - - **29**
See PRACTICE. 6.

CHARITY—*Charity Lands—Charity Founded by Deed—Sale by Trustees of Lands under Power in Deed—Consent of Charity Commissioners—"Scheme legally established"—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24, 26—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 7–69.] A deed founding a charity, and duly enrolled under 9 Geo. 2, c. 36, is not "a scheme legally established" within s. 29 of the Charitable Trusts Amendment Act, 1855; and the trustees in whom the lands of the charity are vested cannot sell such lands under a power of sale contained in the deed, otherwise than with the authority of Parliament, or of the Court, or with the approval of the

CHARITY—*continued.*

Charity Commissioners.—The meaning of the expression "scheme legally established" defined by the Court; and the decision of Stirling J. (ante, p. 54) affirmed. *In re* MASON'S ORPHANAGE AND LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - C. A. 596

2. —— *Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *s.* 14—*Excepted Endowments—Scheme—Jurisdiction.*] In 1890 a scheme was approved of under the provisions of the Endowed Schools Act, 1869, dealing with certain of the endowments of Christ's Hospital.—Among the endowments excluded from the scheme of 1890 were educational and non-educational endowments which were of less than fifty years' standing on August 2, 1869, the time limited for the commencement of the Act of 1869.—By the scheme of 1890 it was provided that the endowments dealt with by it should be administered by the governing bodies thereby constituted, namely, the governors and the council of almoners, in accordance with the scheme under the name of Christ's Hospital, the result being that with regard to the endowments comprised in the scheme the charity was reconstituted, but with regard to the excepted endowments the old governing body and its powers and duties as constituted and existing at the date of the scheme were left intact, and were wholly exempted from the operation of the scheme.—The scheme under consideration proposed that all the excepted educational endowments should be made over to the governing body constituted by the scheme of 1890, in augmentation of the endowments already comprised therein, and should be dealt with and administered according to that scheme. The scheme was opposed by the existing governing body of the excepted endowments:—*Held*, that it was beyond the jurisdiction of the Court to sanction the scheme in the face of the opposition of the existing governing body, their title being founded on Royal Charter and established by Act of Parliament, and no breach of trust being charged.—Sect. 14 of the Endowed Schools Act, 1869, has left the jurisdiction of the Court untouched in regard to endowments within the fifty years' limit, it has neither diminished nor increased the jurisdiction. The section can at most assist the Court in the exercise of its discretion. ATTORNEY-GENERAL *v.* GOVERNORS OF CHRIST'S HOSPITAL - - - - 879

3. —— *Gift to—Will—Construction—Gift "to the Poor and the Service of God."*] A gift by will "to the poor and the service of God" is a good charitable gift.—*Powerscourt* v. *Powerscourt* (1 Molloy, 616) is an authority to this effect. *In re* DARLING. FARQUHAR *v.* DARLING - 50

CHARITY COMMISSIONERS — Consent of — Charity founded by deed - - 596
See CHARITY. 1.

CHURCH BUILDING ACTS—*Church Land taken by Public Body—Application of Purchase-money—Power of Ecclesiastical Commissioners—Church Building Act*, 1840 (3 & 4 *Vict. c.* 60), *s.* 19.] A piece of land having been in 1846, under the authority of the Church Building Acts then in force, voluntarily granted in fee to the Church Building Commissioners for ecclesiastical purposes, a church was built thereon. The whole of the land was inclosed, and in 1849 the church was consecrated. So much of the land as was not actually occupied by the church was not consecrated. In 1891 the London County Council, under their statutory powers, purchased part of the unconsecrated inclosure, and the purchase-money was paid into court under the Lands Clauses Consolidation Act, 1845. The purchased land was afterwards conveyed by the vicar to the county council. Upon a summons by the vicar for payment out:—*Held*, that, notwithstanding the consecration, the Ecclesiastical Commissioners (as the successors of the Church Building Commissioners) had power, under s. 19 of the Church Building Act, 1840, with the consent of the original donor of the land, to direct that the purchase-money should be applied to any of the purposes mentioned in that section:—*Held*, also, that the payment of part of the principal money remaining due upon a mortgage to the Governors of Queen Anne's Bounty of the glebe, profits, and emoluments of the vicarage, made by a former vicar to secure the repayment of a loan made to him by the governors for the purchase of a vicarage-house, was an ecclesiastical purpose within the meaning of s. 19. *Ex parte* LONDON COUNTY COUNCIL. *Ex parte* VICAR OF CHRIST CHURCH, EAST GREENWICH - - - - 520

CLUB—Conversion of part of residential flat into —Injunction - - - 265
See INJUNCTION. 1.

COMMITTEE—Exercise of powers—Power of leasing - - - - 117
See LUNACY. 2.

COMPANY—*Deceased Shareholder—Increase of Capital—Allotment of New Shares—Option—Legal Personal Representative—"Member"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Sched. I., Table A, Art.* 27—*Notice—Offer of New Shares—Posting to Registered Address.*] "Member" in art. 27 of Table A to the Companies Act, 1862—which provides that on the increase of the capital of a company the new shares shall be offered to the "members" in proportion to their existing shares—includes a deceased member so long as his name is on the register.—Thus, where, in the case of a company regulated by Table A, new shares had been created by special resolution in the lifetime of a member, but were not actually offered to the members of the company until after his death:—*Held*, that the legal personal representative of the deceased member, whose name still remained on the register, could require an allotment of the shares which the latter would, if living, have been entitled to have offered him, these shares not yet having been disposed of by the company; but, *quære*, as to the title of the legal personal representative to the shares, if, as was not the case, the company had sent by post a letter containing the offer directed to him at the registered address of the deceased member, or directed to the place of abode or business of the representative or his solicitor, and, not having received an answer applying for the shares within the time limited by the letter, had proceeded to dispose of them

COMPANY—*continued.*

otherwise.—Where one of the articles of association of a limited company prescribes a particular mode of allotment of new shares, *quære*, whether it is competent for the company by special resolution to sanction a different mode of allotment without having first passed a special resolution duly altering that article. JAMES *v.* BUENA VENTURA NITRATE GROUNDS SYNDICATE [C. A. 456

2. —— *Directors—Notice of Meeting of Directors—Notice of Business to be Transacted—Authority to use Name of Company.*] Directors of a company, being the select managing body, can at any meeting of the board deal with all affairs of the company then requiring attention, whether ordinary or not, and previous notice of the special business is not a necessary condition of the proceedings being valid.—S., T., and W. were the directors of a newly-formed company, no shares in which had been allotted, two directors being a quorum. T. and W., without notice to S., held a meeting on February 14, at which they appointed X. a director, appointed solicitors and bankers, and accepted an offer for the use of offices. On the 22nd, S., who had heard of these resolutions, obtained a memorandum, signed by five of the seven signatories to the memorandum of association, authorizing him to use the name of the company in an action to prevent the directors from carrying out the resolutions of the 14th, and on the same day he issued a writ against T. and W., in which he and the company were co-plaintiffs. On the same day, before the writ had been served, S. received a notice that a board meeting would be held on the 24th, not stating the nature of the business to be done, and a letter from W. stating that the business done on the 14th would be brought up again. On the 24th S. did not attend, and T. and W. appointed X. and Y. directors, and allotted to each of themselves the number of shares which was the qualification of a director, and affirmed the resolutions of the 14th. The writ was then amended by adding X. and Y. as defendants, and asking a declaration that the resolutions of the 24th were void, and an injunction to restrain the defendants from acting upon them, and to restrain X. and Y. from acting as directors. The company, pursuant to a resolution passed on the 24th, moved, by the solicitors appointed by the above resolutions, to have the name of the company struck out as used without authority;—*Held*, reversing the decision of North J., that the resolutions of February 24 were valid, and X. and Y. duly elected directors:—*Held*, further, that S. had used the name of the company without authority; that, as the resolutions of February 24 were valid, the motion to strike the name out was authorized; and that it must be struck out with costs to be paid by S. LA COMPAGNIE DE MAYVILLE *v.* WHITLEY - C. A. 788

3. —— *Shareholder—Payment of Shares in advance of Calls—Interest on Amount Prepaid—Payment out of Capital—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 14, 38; *Table A, clause* 7.] The articles of association of a limited company provided that the board of directors "shall be at liberty from time to time, as they think fit, to

COMPANY—*continued.*

receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine," and that "the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls":—*Held*, that these provisions of the articles were valid, and that, there being no profits, interest on moneys paid by shareholders in advance of calls could legally be paid out of capital.—Decision of Stirling J. affirmed.—*Dale* v. *Martin* (9 L. R. Ir. 498; 11 L. R. Ir. 371) approved. LOCK *v.* QUEENSLAND INVESTMENT AND LAND MORTGAGE CO. - - - - C. A. 397

4. —— *Shareholder—Unclaimed Dividends—Statutes of Limitation.*] When a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law, and the Statute of Limitations immediately begins to run. The declaration does not make the company a trustee of the dividend for the shareholder, and an entry of the liability in the company's books—at any rate when no special part of its assets is set aside as representing the dividend and no notice of the entry is given to the shareholder—does not take the case out of the statute.—*Quære*, whether, in the case of a company under the Companies Acts, 1862 to 1890, the period of limitation is six or twenty years. *In re* SEVERN AND WYE AND SEVERN BRIDGE RAILWAY COMPANY - - - 559

5. —— *Shares—Misrepresentation by Agent—Rescission of Contract.*] A person suing a company to obtain rescission of an agreement to take shares in it must, generally speaking, bring his case under one of the following heads:—(1.) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf. —(2.) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority, including the case of a person constituted agent by subsequent adoption of his acts.—(3.) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentation.—(4.) Where the contract is made on the basis of certain representations, whether the particulars thereof were known to the company or not, and it turns out that some of them were material and untrue. LYNDE *v.* ANGLO-ITALIAN HEMP SPINNING COMPANY 178

6. —— *Winding-up—Costs—Security—Official Receivers and Liquidators—Misfeasance Summons—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] In a compulsory winding-up a small dividend only had been paid to the debenture-holders, and there was enough to pay another small dividend to them. The official receiver and liquidator took out a misfeasance summons against officers of the company, and they applied for security for their costs of the summons, the application being opposed by the official receiver and liquidator:—*Held*, that the Court had jurisdiction at the hearing of the summons to make the official receiver and liqui-

COMPANY—*continued.*

dator personally pay the costs, and that in considering whether it should do so it would have regard to the fact that he had opposed an application for security; and that on this ground the application for security must be refused, but without costs. *In re* W. Powell & Sons 681

7. —— *Winding-up — Creditor — Proof by Lessor—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 158—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] Since the decision of the House of Lords in *Hardy* v. *Fothergill* (13 App. Cas. 351) the old cases as to proofs in the winding up of insolvent companies, in respect of their liabilities under leases, require reconsideration; and it is the duty of the Court to assist a lessor in proving in respect of an insolvent company's obligation as lessee, where he desires to prove at once for his loss on the footing of the lease being treated as determined.—*Semble*, that proof may at once be made in respect of all liabilities—present or future, certain or contingent—of the company as lessee.—*In re New Oriental Bank Corporation* (*No.* 2) ([1895] 1 Ch. 753) distinguished. *In re* Panther Lead Company - - - 978

8. —— *Winding-up—Misfeasance—Directors—Auditors—False Balance-sheets—Payment of Dividends where no Profits—Duties as to Stock-taking—Ultra vires—Damages for Improper Continuation of Business—Remoteness—Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] "Misfeasance" in s. 10 of the Companies (Winding-up) Act, 1890, covers every misconduct by an officer of a company, as such, for which he might, apart from the section, have been sued, and includes the case of an auditor who, either knowingly or through failure to use reasonable skill and care, certifies accounts which ought not to have been certified, provided the direct result is pecuniary damage to the company.—Directors who pay away the funds of their company honestly, and reasonably believing in a state of facts which would justify the payment, are not bound to replace the funds because it subsequently turns out that on the true facts the payment was ultra vires.—An ordinary trading company (as well as an investment company, and a company formed to work a necessarily wasting property) may lawfully pay a dividend to shareholders out of current profits, without setting aside a sum sufficient to cover depreciation in the value of the fixed capital.—Ordinary directors of a company are entitled to rely on certificates of its manager as to the value of its stock-in-trade; but auditors, although it is no part of their duty to take stock, are not entitled to rely on the manager's certificate if an ordinary careful examination of the books ought to have made them suspect the truth of it.—For some years before a company was wound up balance-sheets, signed by its auditors, were published by the directors to the shareholders, in which (1.) the value of the company's mill and machinery, and (2.) the value of its stock-in-trade, were greatly overstated. The directors and one of the two auditors knew that (1.) was an overvalue, but none of them knew that (2.) was, but they believed and relied on certificates, deliberately false, given by J., one of the directors who was also manager. Dividends

COMPANY—*continued.*

were for some years paid on the footing that the balance-sheets were correct. If the excess in value in respect of (1.) and (2.), or either of them, had been deducted, there would have been no profits available for dividend. But taking the stock-in-trade at the amounts stated in the certificates, and the mill, machinery, and site at their true value, the company was not insolvent until the last year of its existence.—In the winding-up of the company it was sought to make the directors and auditors liable (*a*) for the dividends, (*b*) for the damages alleged to have resulted from continuing the company's business on the footing that the balance-sheets were correct:—*Held*, that the directors, other than J., were not, though the auditors and J. were, liable for the dividends, but that the damages were too remote, and neither the directors nor auditors were liable for them. *In re* Kingston Cotton Mill Company (No. 2) [331

9. —— *Winding-up—Misfeasance of Officers—Auditors—Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] An auditor of a limited company was appointed under articles of association which, so far as they related to the audit of accounts, were in substantially the same terms as the audit clauses of Table A and as the articles of association in *In re London and General Bank* ([1895] 2 Ch. 166), although it was not a joint stock banking company:—*Held*, on the authority of that case, that he was an officer of the company within s. 10 of the Companies (Winding-up) Act, 1890.—*Per* Vaughan Williams J.: In every case where an auditor of a company is appointed under articles of association which impose upon him the duty of examining the balance-sheet and reporting to the members whether, in his opinion, it is a full and fair balance-sheet, containing the particulars required by the articles, and properly drawn up so as to exhibit a true and correct view of the company's affairs, he is an officer of the company within s. 10 of the Companies (Winding-up) Act, 1890. *In re* Kingston Cotton Mill Company C. A. 6

10. —— *Winding-up—Set-off—Mutual Dealings—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] The characteristic of mutuality is still as necessary under the mutual credit clause of the Bankruptcy Act, 1883, as under the mutual credit clauses of prior Bankruptcy Acts, in order that a set-off may be claimed.—Where moneys of a company are paid to a person for certain specified purposes, and after those purposes are satisfied a balance remains with the payee, he cannot, if a winding-up takes place, set off a debt owing to him by the company unless he can shew that the balance was retained by him with the consent of the company. *In re* Mid-Kent Fruit Factory [567

11. —— *Winding-up—Shares "Fully paid"—Contributory—Original Allottee—Estoppel—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] Before a company was incorporated P. gave W. 500*l.* on W. promising to procure an allotment to P. of one hundred fully paid 5*l.* shares in the company when incorporated. W. was entitled under an agreement with the company (which

COMPANY—*continued.*

was not filed with the Registrar of Joint Stock Companies) to fully paid shares in the company, and after the company was incorporated W. had 100 of these shares allotted to P. as his nominee. The certificate stated untruly that the shares were fully paid. No part of the 500*l.* was ever paid to the company. P. sold twenty of the shares, and never repudiated any of them:—*Held*, in the winding-up of the company, that it was estopped from denying that the shares were fully paid, and that P. was not liable as a contributory. *In re* BUILDING ESTATES BRICKFIELDS COMPANY. PARBURY'S CASE - - - 100

12. —— *Winding-up—Voluntary Winding-up—Reconstruction—Option of Shareholders to take Shares in new Company—Application by Shareholder—Failure of Liquidator to procure Allotment—Liability in Damages—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 98, 133, 138, 151, 161—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 10, 13—*Companies Winding-up Rules*, 1890, *rr.* 89, 90.] A scheme for the reconstruction of a company, which was in voluntary liquidation under the supervision of the Court, provided that the undertaking should be sold to a new company, and that the shareholders should have the option of taking shares in the new company in proportion to their holding in the old. In accordance with the terms of a circular issued by the liquidator, B., a shareholder in the old company, signed an application for shares in the new company and sent it, with a cheque for the required deposit, to the bankers of the company, who sent him a receipt therefor. The bank subsequently sent to the liquidator, at his request, a list of persons who had applied for shares, but did not include therein the name of B. The liquidator afterwards sold the whole of the shares unapplied for, together with those which should have been allotted to B. He had no assets undistributed in his hands except the proceeds of sale of the shares unapplied for, and he had no shares which he could allot to B. Upon a summons by B. in the winding-up:—*Held*, that the Court had no jurisdiction to declare the liquidator liable in damages. *In re* HILL'S WATERFALL ESTATE AND GOLD MINING COMPANY [947

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CONTRACT—Rescission—Shares - - 178
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CONTRIBUTION — Between co-trustees—Breach of trust—Trustee beneficiary - 685
See TRUSTEE. 4.

COPYHOLD—*Married Woman Tenant on the Rolls—Declaration of Trust by Deed acknowledged—Effect of—"Disposition"—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.] A declaration of trust of copyholds by a married woman, tenant on the rolls of the manor, by a deed acknowledged under the Fines and Recoveries Act, is a "disposition" within the meaning of s. 77 of the Act, and will effectually bind the copyholds as against her customary heir. Such a case is not within the proviso to the section. CARTER *v.* CARTER - - - - - - 62

COPYRIGHT — *Design—Infringement—Pattern, Shape, and Configuration—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 60—*Designs Rules*, 1883, *r.* 9.] The plaintiffs registered a design for an upright hexagonal metal stove, the sides of which had the representation in metal work of a church window, of a particular style of architecture, with tracery above and below, the design being registered as applicable to pattern, shape, and configuration. The defendants produced a hexagonal upright stove with a design of a church window, of a different style of architecture, with different tracery, but the general appearance of the stove was very similar to that of the plaintiffs' stove:—*Held*, by the Court of Appeal, reversing the decision of Kekewich J., that the defendants' stove was an obvious imitation of the plaintiffs' stove and an infringement of his copyright.—*Hecla Foundry Co.* v. *Walker, Hunter & Co.* (14 App. Cas. 550) applied.—Where a design is registered as applicable to pattern, shape and configuration, the registration applies to the design as a whole, and it is protected although in one of those particulars it may not be novel.—The owner of a registered design is not deprived of his right to protection merely because he places on the articles which he sells, besides the registered number of his design, other numbers which ought not to be there.—Where a design is registered, and before the expiration of the term of protection the same design with an unimportant variation is registered, the original design may be copied as soon as the original term of protection expires, provided the variation is not copied. JOHN HARPER & CO., LIMITED *v.* WRIGHT AND BUTLER LAMP MANUFACTURING COMPANY, LIMITED [C. A. 142

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—— Professional misconduct — Suppression of pending petition for inquisition - 536
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—— Restrictive as to trade—Acquiescence—Injunction - - - - 653
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CREDITOR—Plaintiff in representative capacity—Title of action - - - 628
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CUSTOM—*Validity—Recreation—Custom laid in Inhabitants of more Parishes than one.*] A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad. EDWARDS *v.* JENKINS - - - - 308

DAMAGES—*Injury to Land—Trespass by tipping Spoil—Way-leave—Measure of Damages.*] The defendants having trespassed on the plaintiffs' land by tipping spoil thereon from their colliery:—*Held*, that, though the trespass was committed openly and with the knowledge of the plaintiffs, the principle of the way-leave cases such as *Martin* v. *Porter* (5 M. & W. 351), *Jegon* v. *Vivian* (L. R. 6 Ch. 742), and *Phillips* v. *Homfray* (L. R. 6 Ch. 770) applied, and that the value of the land for the purposes for which it was actually used by the wrongdoer ought to be taken into consideration in assessing the damages for so much thereof as was covered with spoil, and that as to the rest the measure of damages was the diminished value thereof to the plaintiffs by reason of the wrongful acts of the defendants. WHITWHAM *v.* WESTMINSTER BRYMBO COAL AND COKE COMPANY - - - - - - 894

DEATH DUTIES—Estate duty—Finance Act, 1894 - - - 257, 620, 914
See REVENUE. 1—3.

DEBENTURES—*Industrial and Provident Societies—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 17.] Debentures issued by a society registered under the Industrial and Provident Societies Acts, and charging the society's personal chattels by way of security for the payment of money, are not exempted by s. 17 of the Bills of Sale Act (1878) Amendment Act, 1882, from the statutory requirements in respect of bills of sale.—*In re Standard Manufacturing Co.* ([1891] 1 Ch. 627) distinguished. GREAT NORTHERN RAILWAY COMPANY *v.* COAL CO-OPERATIVE SOCIETY - - - 187

DECEASED SHAREHOLDER—Allotment of new shares—Legal personal representative
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DELAY—Executor—Right of retainer - 956
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DIRECTOR—Notice of meeting—Notice of business to be transacted - - 788
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—— Payment of dividends where no profits—Liability - - - - 331
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DISCLAIMER—Partial—Property in England and abroad - - - - 228
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—— Unclaimed—Statutes of Limitation - 559
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DOWER—*Widow's Charge—Abatement—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *ss.* 2, 4.] Dower out of real estate of an intestate is subject to abatement in respect of the widow's charge of 500*l.* imposed on the intestate's estate by the Intestates' Estates Act, 1890. *In re* CHARRIERE. DURET *v.* CHARRIERE - - 912

DUTY—Public revenue.
See REVENUE.

EASEMENT—*River—Opening Locks on River—Prescription—Presumption of Lost Grant.*] The defendant corporation, being the owners of a mill and of several low-lying lands, had for upwards of 200 years exercised an uninterrupted right to open in times of flood certain river locks now belonging to the plaintiff. By a deed of 1689 a predecessor of the plaintiff granted to the corporation the right that the miller, or other appointee of the corporation, should open the locks in question in times of flood:—*Held*, (1.) that, apart from the deed, the corporation were, either by prescription or presumption of lost grant, entitled to the right as an easement, and that such easement would be presumed to have been granted in respect of the lands of the corporation affected by the exercise of the right; (2.) that the corporation were entitled under the deed in respect of the mill. SIMPSON *v.* MAYOR OF GODMANCHESTER - - - - C. A. 214
—— Grant of new—Scale fee - - 480
See SOLICITOR. 3.

ECCLESIASTICAL COMMISSIONERS — Church land taken by public body—Application of purchase-money - - - 520
See CHURCH BUILDING ACTS.

ELEMENTARY EDUCATION.
See SCHOOL BOARD.

ENDOWED SCHOOL—Scheme—Jurisdiction 879
See CHARITY. 2.

ESTATE DUTY—Apportionment 257, 620, 914
See REVENUE. 1—3.

ESTOPPEL—Company — Certificate that shares were fully paid up - - - 100
See COMPANY. 11.

—— Res judicata—Validity of patent upheld
See PATENT. 2. [667

EXECUTOR—*Administration—Executor-legatee—Equitable Assets—Mortgage—Priorities of Equitable Interests—Notice.*] The rule—that a purchaser for value, of an asset of the testator, from an executor who is also residuary legatee, acquires a title free from the claims of unsatisfied creditors of the testator, if the purchaser took without notice of the unsatisfied debts or of anything which made it improper for the executor so to deal with the asset—applies in the case of equitable as well as legal assets; provided that neither the executor nor the Court administering the testator's estate still retains control over the asset, as, e.g., in *Noble* v. *Brett* (24 Beav. 499) and *Hooper* v. *Smart* (1 Ch. D. 90).

In 1878 the registered holder of railway stocks covenanted to pay an annuity to the trustees of a settlement during the joint lives of himself and his wife and the life of the survivor. In 1882 he died having bequeathed all his property to his widow, and appointed her his executrix. The widow proved the will, and by various deeds from 1886 to 1892 transferred the stocks to her bankers to secure a debt of her own. In December, 1892, the widow gave an equitable charge on the stocks to the plaintiff to secure advances made to her. Neither the bankers nor the plaintiff when taking their respective securities had knowledge or notice that any debt of the testator remained unpaid, or that the widow was not entitled to deal with the stocks as she did, and the plaintiff, before he had notice that there was any indebtedness of the testator, gave notice of his charge to the bankers. The bankers sold the stocks, and, having retained the amount owing to them, paid the balance into Court:—*Held*, that the plaintiff's charge on the balance had priority over the claims of the settlement trustees. GRAHAM *v.* DRUMMOND - - - 968

2. —— *Retainer—Annuity—Administration.*] An administratrix, an annuitant under covenant by her intestate, whose estate is insolvent, is entitled to retain all arrears falling due during administration, but only to prove for the value of her future annuity. *In re* BEEMAN. FOWLER *v.* JAMES - - - - - - - 48

3. —— *Retainer—Debt due from Bankrupt Legatee.*] A surety for a mortgagor bequeathed to him a share of the residue of his estate, subject to the life interest of the testator's widow. After the death of the testator the mortgagor became bankrupt. He never obtained a discharge, and the bankruptcy was never closed. Neither the mortgagees nor the testator's executors proved in the bankruptcy. After the bankruptcy the executors made some payments to the mortgagees in pursuance of the testator's liability under his contract of suretyship:—*Held*, that, on the death of the tenant for life, the executors were entitled, notwithstanding the bankruptcy, to retain out of the mortgagor's share of the residue the amount

EXECUTOR—*continued.*

of the payments which they had thus made to the mortgagees, with interest thereon at 4 per cent. *In re* WATSON. TURNER *v.* WATSON 925

4. —— *Retainer—Right of—Administration—Debt—Surety—Indemnity—Delay.*] In an administration action an executor does not lose his right of retainer merely by reason of delay—such as not claiming his right until after the chief clerk has made his certificate under the judgment—or by the fact of his having paid the assets into court or to a receiver, provided the delay can be satisfactorily explained and there are assets against which he can exercise his right.—The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator creates an equitable debt in respect of which he may exercise the right of retainer.—*In re Harrison* (32 Ch. D. 395) considered. *In re* GILES. JONES *v.* PENNEFATHER - - - - 956

5. —— *Retainer—Right of—Debtor and Creditor—Statute-barred Debt—Payment out of Court.*] In 1890 an inquiry was directed as to the persons interested in a fund standing to the account of the legal personal representative of G. H., deceased, the surviving partner in several firms. G. H. had died in 1842, and the fund had been carried to this account in 1883. In 1892 it was found that one-fourth of the fund belonged to G. H., and on August 10, 1893, in the presence of his administrator de bonis non, an order was made carrying over the share of G. H. to a separate account, and directing an inquiry as to the persons beneficially interested in it. F. H. was a creditor of G. H., but his debt had been barred by the Statute of Limitations. Before the inquiry had been answered the personal representative of F. H., who was also administrator de bonis non of G. H., claimed to have the fund paid out to her as legal personal representative of G. H., the object being to exercise a right of retainer over the fund for the debt due to her as personal representative of F. H.:—*Held*, by Stirling J., that the Court will not order a fund to be paid out to an executor or administrator having the legal title to a statute-barred debt merely in order to enable him to acquire a right of retainer thereout:—*Held*, on appeal, that even if the Court would otherwise have done so, the representative of G. H. could not ask to have the fund paid out to her when the effect of so doing would be to defeat the inquiry which had been directed in the presence of the then legal personal representative of G. H. TREVOR *v.* HUTCHINS [C. A. 844

6. —— *Residue—Appropriation of Assets.*] Executors may appropriate specific assets to a trust share of residue, or transfer them to the legatee of a share, in advance of final division.—Executors entitled to two-fifths of a residue, the other three-fifths being settled, before final division transferred securities, since risen in value, at the market price, to one of themselves as part of his fifth share:—*Held*, that, though there was no corresponding appropriation in respect of the settled shares, the transaction was valid against the beneficiaries. *In re* RICHARDSON. MORGAN *v.* RICHARDSON - - - - 512

EXECUTORY LIMITATION — Contingent remainder or—Appointment - 272
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EXONERATION—Rent-charge—Sale of part of land - - - - - 235
See SETTLED LAND. 3.

FIDUCIARY RELATION—Mortgagor and mortgagee - - - - 762
See MORTGAGE. 3.

FLAT—Conversion of part of residential, into a club—Injunction - - - 265
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FORECLOSURE.
See MORTGAGE.

GARNISHEE ORDER—Provision against alienation—Attachment of income - 630
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GRANT— Of administration —Subsequent discovery of will - - - 270
See TRUSTEE. 10.

—— Presumption of lost—Opening locks on river - - - - - 214
See EASEMENT.

HUSBAND AND WIFE—*Legacy for Separate Use—Seizure by Husband—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 12.] A woman who was married in 1854 received in 1876 a legacy of 300*l.* given for her separate use, but was forcibly deprived of the money by her husband, who knew that it was a legacy. During the husband's lifetime the wife frequently asked him for the money; but no proceedings to recover it were taken until after his death, which occurred in 1894:—*Held*, that the husband was affected with notice of the separate use, and was a trustee of the money for his wife; that the Statute of Limitations was no defence to proceedings by her against his executors; and that the wife was entitled to be paid the amount of the legacy, with interest at 4 per cent. from the date of her husband's death. WASSELL *v.* LEGGATT - - - - 554

2. —— *Married Woman—Restraint on Anticipation—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39—*Debts caused by Extravagance—Money-lender.*] In exercising its discretion under s. 39 of the Conveyancing Act, 1881, the Court has to balance the undoubted benefit of the restraint against the alleged benefit of its removal, and to see whether, in all the circumstances, the benefit of the removal preponderates.

The Court will not yield to applications under the section in cases where it is sought to remove the restraint in order to raise money for the payment of debts which have arisen through the extravagance of the married woman or her husband, and the restraint will not be removed in cases where the married woman has borrowed the money from a professional money-lender. *In re* POLLARD'S SETTLEMENT - - 901

3. —— *Married Woman—Reversionary Life Interest—Assignment—Beneficial Interest in Trust Money Invested on Mortgage of Realty—"Estate"—"Interest in Land"—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77—*Mortmain Act* (9 *Geo.* 2, *c.* 36), *s.* 3.] In a case not falling within Malins' Act (20 & 21 Vict. c. 57):—*Held*, by Lindley and A. L. Smith L.JJ. (Kay L.J. dissentiente), that a married woman's equitable reversionary life interest in a sum of money, properly invested by her trustees upon a mortgage of land, is an interest in land within s. 77 of the Fines and Recoveries Act, so that she can dispose thereof by deed acknowledged and with her husband's concurrence.—The decision of Stirling J. reversed.—*In re Newton's Trusts* (23 Ch. D. 181) overruled. MILLER *v.* COLLINS [C. A. 573

IMPROVEMENTS—*Tenant in Common—Mortgage—Sale.*] The present value of improvements due to expenditure by a tenant in common in fee of one half, and tenant for life of the other half, of real estate (not exceeding the expenditure) allowed in distributing the surplus proceeds of sale by a paramount mortgagee among the persons entitled to the equity of redemption. *In re* COOK'S MORTGAGE. LAWLEDGE *v.* TYNDALL 923

INDEMNITY—Executor—Surety—Right of retainer - - - - 956
See EXECUTOR. 4.

INDUSTRIAL AND PROVIDENT SOCIETIES—Bill of sale - - - - 187
See DEBENTURES.

INFANT—*Maintenance—Trust—Validity—Remoteness—Discretion of Trustees—Time for Exercise—Power to resort to Past Accumulations—Will—Construction.*] A testator bequeathed to trustees the residue of his personal estate, upon trust for investment and to apply the whole income, or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of the testator's sister, until they should respectively attain the age of twenty-three, and to accumulate and invest as capital any unapplied portion of the income.—And upon further trust, as to both capital and income of the investments, to stand possessed thereof upon trust for the child, if only one, or all the children, if more than one, of the sister who, either before or after her decease, should attain twenty-three (such children, if more than one, to take in equal shares as tenants in common), and the issue of such of the children of the sister as might be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living.—The testator died in February, 1888. His sister, who was a widow, had only two children, a daughter who attained twenty-three on March 10, 1892, and a son who was born on May 28, 1874. On January 30, 1889, upon a summons issued by the trustees of the will, the sister's two children being defendants, the Court was of opinion that the bequest of the residuary personalty to her children was void for remote-

INFANT—*continued.*

ness, but that the persons to take the residuary personalty could not be determined till her death. And it was ordered that the trustees should accumulate the surplus income until further order. The trustees had never applied any part of the income under the discretionary trust for maintenance, &c., but had accumulated the whole in accordance with the order. Upon a summons in 1895 by the sister's two children:—*Held*, that the trust for maintenance was distinct from the trust of the capital of the residuary personalty, and was valid; that the trustees could now exercise the discretion given to them by the will; that in their absolute discretion they might now apply all or any part of the income which accrued down to March 10, 1892, and of the accumulations thereof, in or towards the maintenance, &c., of the two plaintiffs, and similarly might apply all or any part of the income from March 10, 1892, and of the accumulations thereof, and of the future income and accumulations until the younger plaintiff should attain twenty-three, for his maintenance, &c. *In re* WISE. JACKSON *v.* PARROTT - - - - - 281

2. —— *Wards of Court—Custody—Religious Education—Parental Authority—Misconduct of Father.*] Although by law it is the right of the father to have the care and custody of his infant children and to have them brought up in his own religion, the welfare of the infants is the paramount consideration, and the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and to disregard his wishes as to their religious education. The conduct of a living father may be such as to compel the Court to exercise this jurisdiction.

A Roman Catholic father allowed his two infant children by a deceased Protestant wife to be brought up in the Protestant faith until one of them was fifteen and the other eleven years of age, and his conduct to them, in the view of the Court, shewed that he had abdicated his parental rights. The children were wards of Court, and the father, being desirous of resuming his parental authority, applied to the Court for an order that the children might thenceforth be brought up in the Roman Catholic faith:—*Held*, by the Court of Appeal, affirming the judgment of Kekewich J., that it would be injurious to the welfare of the children that their religious training should be altered, and that, having regard to the conduct of the father and the circumstances of the case, his application must be refused. *In re* NEWTON (INFANTS) - - - - C. A. 740

—— Signature to instrument of dissolution of society - - - - 611
See BUILDING SOCIETY. 1.

—— Tenant in tail in possession—Form of vesting order - - - - 549
See TRUSTEE. 7.

INFRINGEMENT — Appeal — Evidence on — Jurisdiction - - - 108
See PATENT. 1.

—— Design—Pattern, shape, and configuration
See COPYRIGHT. [142

—— Patent - - - - 108, 667
See PATENT. 1, 2.

INJUNCTION — *Implied Obligation — Common Scheme—Residential Flat.*] An injunction was granted to restrain the conversion into a club of a large part of a building, adapted to occupation in residential flats, at the instance of a tenant who held under an agreement in a common form binding the tenants to rules suitable only for residential purposes. HUDSON *v.* CRIPPS - 265

2. —— *Practice — Offer of Undertaking by Defendant—Costs.*] In an action to restrain the infringement of a patent a defendant, on being served with the writ, offered to undertake not to infringe, to give the other relief claimed by the writ, and to pay the plaintiff's costs. Notwithstanding this offer the plaintiff delivered a statement of claim and particulars of breaches. The defendant then delivered a defence; and the plaintiff moved for judgment in the terms of the statement of claim:—*Held*, that the plaintiff ought to have accepted the undertaking offered; and, on the defendant's giving the undertaking, the Court declined to grant an injunction, giving to the plaintiff costs down to the date of the offer and the costs of the day's appearance, and to the defendant the other costs subsequent to the offer. JENKINS *v.* HOPE - - - - 278

—— Restrictive covenants as to trade—Acquiescence - - - - 653
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—— Service out of jurisdiction - - 25
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—— Payment of shares in advance of calls—Interest out of capital - - 397
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INTESTACY—Dower—Widow's charge - 912
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INVESTMENT—Breach of Trust—Liability of trustee - - - - 71, 323
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JURISDICTION—High Court of Justice—Setting aside agreement as to costs - 222
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—— Liability of liquidator in damages - 947
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LANDLORD AND TENANT—Proof by lessor—Winding up of insolvent company 978
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LEGACY DUTY—Annuity out of rents of realty
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LIMITATIONS, STATUTE OF—Legacy for separate use—Seizure by husband - 554
See HUSBAND AND WIFE. 1.

—— Statute-barred debt—Executor—Right of retainer - - - - 844
See EXECUTOR. 5.

—— Unclaimed dividends - - - 559
See COMPANY. 4.

LIQUIDATOR—Liability in damages—Jurisdiction of the Court - - - 947
See COMPANY. 12.

LOCKS—Opening, on river—Prescription - 214
See EASEMENT.

LUNACY—*Bankrupt Lunatic — Property under Control of Trustee in Bankruptcy—Payment into Court in the Lunacy — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-s.* 2—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5).] The Court in Lunacy has no jurisdiction to order the trustee in the bankruptcy of a lunatic to pay into court to the credit of the lunacy moneys in his possession or control, for the purpose of enabling the committee to apply the same for the benefit of the lunatic. *In re Farnham* ([1895] 2 Ch. 806) explained. *In re* FARNHAM (A LUNATIC), (No. 2) [C. A. 836

2. —— *Person lawfully detained as Lunatic —Person appointed to exercise the Powers of a Committee of the Estate—Power of Leasing—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 62—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120.] The person appointed to act, under s. 116 of the Lunacy Act, 1890, as committee of the estate of a person lawfully detained as a lunatic though not so found by inquisition may by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under the Settled Land Act, 1882.—*In re Baggs* ([1894] 2 Ch. 416, n.) distinguished. *In re* SALT [C. A. 117

3. —— *Settled Estate—Lunatic Tenant for Life—Sale of Lunatic's Estate under Settled Land Acts—Conveyance "as Beneficial Owner"—Covenants for Title by Committee—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 4, 20, 55, 62—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 120, 122, 124.] Sect. 124 of the Lunacy Act, 1890, enabling the committee of a lunatic on his behalf to execute and do all such assurances and things for giving effect to any order under the Act as the judge directs, must be construed as giving the Court jurisdiction to authorize a committee who is selling the lunatic's property under an order in that behalf, not only to convey the same on his behalf, but also on his behalf to enter into with the purchaser the covenants usual and proper in such a conveyance, including the ordinary covenants for title.—*In re Fox* (33 Ch. D. 37) is not a decision that in no case can the Court authorize the committee of a lunatic to enter into any covenants on his behalf. *In re* RAY (A PERSON OF UNSOUND MIND) - - - - - C. A. 468

—— Client alleged lunatic—Pending petition for inquisition—Suppression by solicitor *See* SOLICITOR. 1. 536

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MARRIED WOMAN.
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—— Separate use—Restraint on anticipation—Tenant for life—Settled Land Act 159
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—— Tenant of copyholds—Declaration of trust —Acknowledgment - - 62
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MISREPRESENTATION—Shares—Rescission
See COMPANY. 5. 178

MISTAKE—Dismissal of action—Extension of time - - - - - 644
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—— Setting aside judgment by consent—Practice
See PRACTICE. 3. 673

MORTGAGE—*Foreclosure—Practice — Account—Bankrupt Mortgagor—Assessed value of Security —Special Circumstances—Chief Clerk's Certificate.*] Any special circumstance or fact affecting the amount due from the mortgagor to the mortgagee in a foreclosure action—such as a valuation of the security in bankruptcy—should be pleaded, or brought to the attention of the Court, before the usual foreclosure judgment is made, in order that a direction may be given to the chief clerk to have regard, in taking the account, to such special circumstance or fact; if this is not done at the trial no such question can be subsequently raised on taking the account. SANGUINETTI *v.* STUCKEY'S BANKING CO. (No. 2) [502

2. —— *Mortgage of Trust Fund—Receipt of whole Fund by Mortgagee.*] W., being entitled in reversion to one-eighth of a sum of 8000*l.* bequeathed to trustees, assigned it by way of mortgage to G., with power to give receipts in the name of W. or otherwise, with a proviso for redemption. On the death of the tenant for life of the fund, J., to whom the mortgage had been transferred, claimed to receive from the trustees 1000*l.*, the whole amount of the share, the sum due on the mortgage being only about 400*l.* The trustees of the will, who had received notice of subsequent incumbrances, expressed themselves willing to pay to J. what was due on his mortgage, but declined to pay over to him the whole share. J. took out an originating summons to compel payment:—*Held* (reversing the decision of Kekewich J.), that the trustees were not bound to pay over the whole share to J., and that the summons must be dismissed. *In re* BELL. JEFFERY *v.* SAYLES - - - - - C. A. 1

3. —— *Power of Sale—Sale to one of several Mortgagors — Tenants in Common — Purchase-money—Principal, Interest and Costs—Redemption — Purchase by one co-Tenant — Principal and Agent — Fiduciary Relation — Trust — Duties of Mortgagee.*] In the case of a mortgage by several tenants in common, the mortgagee is at liberty, under his power of sale, to sell to any one of the mortgagors for his own benefit, without any notice to or consent of his co-mortgagors, provided the sale is made under a proper and bonâ fide exercise of the power of sale. Nor is the mere circumstance that the sale is for the amount due for principal, interest and costs a ground for impeaching it as being, in effect, a redemption for the benefit of all the mortgagors. Neither is the validity of the sale affected by any fiduciary relation subsisting between the purchasing mortgagor and his co-mortgagors, such as may have arisen from his having, as their agent, received the rents, paid thereout the interest on the mortgage, and generally managed the property.—

MORTGAGE—*continued.*

Farrar v. *Farrars, Limited* (40 Ch. D. 395), explained.—The extent of the fiduciary relation between mortgagor and mortgagee considered.—There is no fiduciary relation between co-tenants of real estate prohibiting one of them from buying or getting in, for his own benefit, an outstanding incumbrance or estate therein.—*Van Horne* v. *Fonda* (5 Johns. Ch. (N.Y.) 388) not followed. KENNEDY *v.* DE TRAFFORD **C. A. 762**

4. —— *Purchase of Equity of Redemption—Payment of Mortgage Debt by Purchaser—Presumption of Intention to keep alive Security.*] An assignment by divers incumbrancers to a purchaser who paid them off:—*Held*, by a majority of the Court, in the circumstances, not to shew any intention of keeping alive the first charge.—Discussion of the limits of the equitable presumption in favour of such intention.—*Toulmin* v. *Steere* (3 Mer. 210) questioned. LIQUIDATION ESTATES PURCHASE COMPANY *v.* WILLOUGHBY [**C. A. 726**

5. —— *Redemption Action—Practice—Order—Payment into Court—Default—Dismissal of Action—Mistake—Extension of Time—Jurisdiction.*] In a redemption action an order was made giving the plaintiff leave to lodge the mortgage money in court, and that, "in default of such lodgment within two months from the date of this order, the action be dismissed with costs." Under a bonâ fide mistake the plaintiff failed to lodge the money in court until after the two months fixed by the order:—*Held*, that, notwithstanding the expiration of the two months, the action was not dead, but that the Court had jurisdiction, at the instance of the plaintiff, to extend the time limited by the order so as to include the actual date of lodgment. COLLINSON *v.* JEFFERY - - - - - **644**

6. —— *Redemption—Principal, Interest and Costs—Tender—Notice—Six Months' Interest—Enforcing Security—Mortgagee taking Possession.*] The rule that a mortgagee who has demanded payment of his mortgage debt, or has taken steps to compel payment of it cannot refuse tender of his principal, interest and costs on the ground that he is entitled to six months' notice or six months' interest in lieu of notice, applies whether the time fixed for payment by the proviso for redemption in the mortgage deed has expired or not; and the rule also applies where the mortgagee has entered into possession of the mortgaged property, entry into possession being, in effect, a demand for payment.—*Brown* v. *Cole* (14 Sim. 427; 14 L. J. (Ch.) 167) considered. BOVILL *v.* ENDLE - - - - - - **648**

—— Claim by mortgagees to prove—Mode of procedure - - - - **904**
See BANKRUPTCY.

—— Priorities of equitable interests—Notice
See EXECUTOR. 1. **968**

MUTUAL DEALINGS—Set-off - - **567**
See COMPANY. 10.

NOTICE—Meeting of directors—Notice of business to be transacted - - **788**
See COMPANY. 2.

NOTICE—*continued.*

—— Onerous covenants—Duty of vendor to disclose - - - - - **637**
See VENDOR AND PURCHASER.

—— Priorities of equitable interests - **968**
See EXECUTOR. 1.

OFFICER OF COMPANY—Misfeasance—Auditor
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PARENT AND CHILD—Keeping alive charge—Presumption - - - **137**
See TENANT FOR LIFE AND REMAINDERMAN.

PARTICULARS—Before or after discovery **29**
See PRACTICE. 6.

PARTIES—Adding—Official receiver - **939**
See PRACTICE. 1.

PARTNERSHIP — *Account, Action for — Illegal Business—Bookmaking and Betting—Intention of Partners—User of "place" for Purposes of Betting—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.] The fact that one partner has been guilty of illegal acts in the conduct of the partnership business is no defence to an action for account by the other partner, where the objects of the partnership were not illegal, and the innocent partner at the time of entering into the partnership intended that it should be carried on lawfully.—The plaintiff and defendant were partners in a bookmaker's and betting business, which was carried on by the defendant; the plaintiff claimed an account of the profits of the partnership, and the defendant contended, having regard to the nature of the business, no such relief could be obtained:—*Held*, that as a bookmaking and betting business could be carried on without contravening the Betting Act, 1853, and that as the plaintiff when he entered into this partnership contemplated that the business would be so carried on in the usual way, the fact that the defendant had acted illegally was immaterial, and the plaintiff was entitled to the account claimed. THWAITES *v.* COULTHWAITE - **496**

2. —— *Arbitration Clause—Action for Dissolution—Motion to stay Proceedings—Discretion of the Judge—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.] Where articles of partnership contain a clause referring all matters in difference between the partners to arbitration, an arbitrator has power to decide whether or not the partnership shall be dissolved, and to award a dissolution, though the judge has full discretion to determine, on a motion to stay proceedings under the Arbitration Act, 1889, s. 4, whether the matters in dispute shall be tried out in the action or referred to arbitration.—*Walmsley* v. *White* (40 W. R. 675) followed.—*Joplin* v. *Postlethwaite* (61 L. T. (N.S.) 629) explained. VAWDREY *v.* SIMPSON - - - - - **166**

3. —— *Retiring Partner—Audit—Stock-taking—Accountants—"Costs, Charges and Expenses"—Trustee—Administration—Capital and Income.*] A partner, on retiring from his firm, left his capital, 15,000*l.*, in the business under an agreement with the continuing partners that it should be a debt due from them to him and bearing

PARTNERSHIP—*continued.*

interest until repayment. The agreement contained a stipulation that the outgoing partner should have free access to the books at all times, and various provisions intended to satisfy the outgoing partner from time to time of the solvency of the business; upon breach of any one of these provisions he was to be at liberty to call in his capital. The outgoing partner subsequently died, having by his will bequeathed his residuary estate, which included his capital in the business, to a trustee upon trusts for one for life and for others in remainder:—*Held*, that the trustee was at liberty to employ accountants and valuers for an audit and stock-taking once a year, if desired, or oftener if special circumstances so required; and that the expenses thereof were costs, charges and expenses properly incurred by the trustee in the execution of the trusts of the will and for the benefit of the whole estate, and were therefore payable out of capital and not out of income. *In re* Bennett. Jones *v.* Bennett - C. A. 778

—— Solicitor—Breach of trust—Liability of partner - - - - 199
See Trustee. 3.

PATENT—*Infringement, Action for—Judgment against Defendant—Leave after Trial for Defendant to adduce further Evidence on Appeal—Application for to Court of Appeal—Jurisdiction—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29—*Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 4.] Anticipation was one of the grounds of defence to an action for infringement of patent, and the judge held the patent to be valid and granted an injunction against the defendant. After the trial the defendant gave notice of appeal, and applied to the Court of Appeal for leave to amend his particulars of objections, and to adduce further evidence of anticipations at the hearing of the appeal:—*Held*, that under the Judicature Acts, and under rule 4 of Order LVIII., the Court of Appeal had jurisdiction to make the order, but that on the merits leave ought not to be granted in the present case.—With reference to the exercise by the Court of Appeal of the powers conferred by Order LVIII., r. 4, a patent action is in the same position as any other action.—*Cropper* v. *Smith* (26 Ch. D. 700; 10 App. Cas. 249) observed upon. Shoe Machinery Company *v.* Cutlan - - C. A. 108

2. —— *Infringement, Action for—Validity upheld—Res judicata—Estoppel—Second Action between same Parties—Validity denied on different Grounds.*] In an action by a patentee claiming damages for an infringement and an injunction, the defendant denied the infringement. He also denied the validity of the patent, alleging, amongst other things, that it had been anticipated by certain specifications.—The Court upheld the validity of the patent, but granted no injunction or damages on the ground that the evidence as to the alleged infringement was, under the circumstances, not admissible. In a second action between the same parties in respect of the same patent, the defendant again denied the validity of the patent, alleging that it had been anticipated by certain specifications which were not before the Court in the first action, and which he had discovered since that action:—

PATENT—*continued.*

Held, that the validity of the patent was res judicata, and that the judgment in the first action estopped the defendant from again denying the validity of the patent. Shoe Machinery Company *v.* Cutlan - - - - 667

PAYMENT INTO COURT—Bankrupt lunatic 836
See Lunacy. 1.

PAYMENT OUT OF COURT—Deceased insolvent in British India - - - 175
See Practice. 7.

POWER—*Appointment—Construction—Remoteness—Contingent Remainder or executory Limitation—Settlement.*] In exercise of a power created by a marriage settlement of real estate (executed in 1819) the husband and wife by deed (executed in September, 1848) jointly appointed that the estate should after the death of the survivor of them (they being tenants for life under the settlement) be to the use of the three children then born (naming them) of the only son of the marriage, and all other his child and children who should be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain the age of twenty-five, equally as tenants in common. But in case either of the three named children of the son and any such other child and children as aforesaid should die under twenty-five, then immediately after his or her death to the use of the survivors or other of them, their, his, or her heirs and assigns. Provided that, in case the appointment intended to be thereby made to the after-born children of the son should from any cause fail of effect, the appointors did thereby further declare that the deed should operate as an appointment of the hereditaments to the three then born children of the son, or such of them as should attain twenty-five, their respective heirs and assigns. The husband died in 1867, and his widow died in November, 1873. There were seven children of the son, all of whom were then living, but only the three elder ones had attained twenty-five. The other four attained twenty-five subsequently:—*Held*, that the limitations of the deed of appointment took effect as legal contingent remainders on the death of the widow; that each of the seven children of the son took one-seventh of the property for life; and that the three who had attained twenty-five at the death of the widow took the remainder in fee (subject to the life estates) equally between them as tenants in common.—*In re Lechmere and Lloyd* (18 Ch. D. 524) distinguished. Symes *v.* Symes - 272

2. —— *Release of—Tenant for Life—Power to appoint among Children—Extinction of Power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.] The fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void. The doctrines applicable to the fraudulent exercise of a power of appointment do not apply to the release of a power not coupled with a duty.—A father, tenant for life under his marriage settlement, had, in the events which had happened, an exclusive power to appoint for the benefit of a daughter or her issue, and in default of appoint-

POWER—*continued.*
ment the fund went to the daughter absolutely; the father, being in want of money, released this power, and subsequently he and his daughter mortgaged their interests in the fund for 10,000*l.*, the whole of which was paid to the father, and applied by him for his own purposes:—*Held*, that the release was valid.—*Smith* v. *Houblon* (26 Beav. 482) and *In re Radcliffe* ([1892] 1 Ch. 227) discussed and applied. *In re* SOMES. SMITH *v.* SOMES [250

PRACTICE—*Adding Parties—Pending Action—Receiving Order in Bankruptcy against Defendant—"Change or Transmission of Interest or Liability"—Official Receiver—Carrying on Proceedings against—Rules of Supreme Court*, 1883, *Order* XVII., *r.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71).] An official receiver in bankruptcy, having no estate or interest vested in him nor any power conferred on him by the Bankruptcy Acts of bringing or defending actions, stands in a different position from a trustee in a bankruptcy or a trustee of any composition or scheme in bankruptcy.—Accordingly the making, after the commencement of an action, of a receiving order against a defendant does not cause any such change or transmission of interest or liability within the meaning of Order XVII., r. 4, as to render it necessary or desirable that the official receiver should be made a party to the action.—Such a transmission of interest or liability within rule 4 of the order would, however, take place when an adjudication order was made, or when a composition or scheme was approved by the Court. *In re* BERRY. DUFFIELD *v.* WILLIAMS [939

2. —— *Appeal—Extension of Time for Appealing—Alteration of Law since Judgment—Costs of Solicitor-Mortgagee—Mortgagees Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.] A solicitor-mortgagee who had, by a judgment given before the passing of the Mortgagees Legal Costs Act, 1895, been held not to be entitled to charge profit costs against his mortgagor, applied after the passing of the Act for an extension of the time for appealing against the judgment, on the ground that s. 3 of the Act is retrospective in its operation:—*Held*, that the Act was not intended to affect judgments given before it was passed, and that there was no ground for extending the time. EYRE *v.* WYNN-MACKENZIE - C. A. 135

3. —— *Consent—Mistake—Judgment by Consent—Setting Aside—Motion.*] After a judgment has been passed and entered—even where it has been taken by consent and under a mistake—the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1.) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, Order XXVIII., r. 11, or (2.) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide—in either of which cases the application may be made by motion in the action.—*Semble*, that different considerations apply to interlocutory orders; but that even if a judgment has not been passed and entered the Court will not always

PRACTICE—*continued.*
interfere on motion, e.g., where from the nature of the ground relied on conflicting evidence is essential. AINSWORTH *v.* WILDING - 673

4. —— *Costs—Set-off—Solicitor's Lien—Independent Proceedings—Rules of the Supreme Court*, 1883, *Order* LXV., *rr.* 14, 27, *sub-r.* 21.] Costs incurred in the High Court cannot be set off against costs obtained in the County Court, although the proceedings are between the same parties. Order LXV., r. 14, does not apply to costs in independent proceedings HASSELL *v.* STANLEY - - - - - 607

5. —— *Counter-claim—Defendant to Counter-claim not Party to original Action—Right to deliver Counter-claim — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of the Supreme Court*, 1883, *Order* XXI., *rr.* 11, 12, 13, 14.] A person not a party to an action, who is brought in by the original defendant as a defendant to a counter-claim, cannot counter-claim against the original plaintiff and defendant.—*Street* v. *Gover* (2 Q. B. D. 498) followed.—*Toke* v. *Andrews* (8 Q. B. D. 428) distinguished. ALCOY AND GANDIA RAILWAY AND HARBOUR COMPANY *v.* GREENHILL - - - - C. A. 19

6. —— *Particulars — Discovery — Fraud — Rules of Supreme Court*, 1883, *Order* XIX., *r.* 6.] There is no hard and fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars; the Court will exercise its discretion upon all the circumstances in each case.—In an action by a colliery company against coal merchants, in which the plaintiffs alleged that they had lost business by reason of the fraudulent acts of the defendants, giving one specific instance of fraud in their statement of claim (which was admitted by the defendants), and alleging that "on divers other occasions" the defendants had taken orders from "divers other persons" for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs:—*Held*, that as the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs had not, the defendants were not entitled to particulars before giving discovery.—Dictum of Kay L.J. in *Zierenberg* v. *Labouchere* ([1893] 2 Q. B. 189) explained. WAYNES MERTHYR COMPANY *v.* D. RADFORD & Co. - - - - 29

7. —— *Payment out — Fund in Court — Deceased Insolvent in British India — English Administration not required.*] A fund in Court, which stood to the credit of a person who had become insolvent at Bombay, and had afterwards died there intestate, was ordered to be paid out to the official assignee of the Insolvent Court at Bombay, in whom all the property of the insolvent had been vested by an order of that Court, without requiring administration in England to be taken out, administration having been granted to his estate in India, and there being evidence that the debts proved in the insolvency were still unpaid, and that the insolvent had not obtained his discharge.—*In re Davidson's Settlement Trusts* (L. R. 15 Eq. 383) followed. *In re* LAWSON'S TRUSTS - 175

PRACTICE—*continued.*

8. —— *Service out of Jurisdiction—Injunction—Act to be done within Jurisdiction—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*f*).] Manufacturers in Switzerland, in reply to a letter from retail dealers in England asking them to send 5 lbs. of a dye which they manufactured, replied by a letter in which they inclosed an invoice of the goods ordered. The invoice described the goods as "bought" by the dealers of the manufacturers, and stated that they were sent to a specified firm in Switzerland "to be held by them at your disposal." The plaintiffs alleged that the dye thus sold was an infringement of their patent, and commenced an action against the English purchasers and the Swiss manufacturers, claiming an injunction. The plaintiffs, having served the purchasers, applied ex parte for leave to issue a concurrent writ and to serve notice thereof on the manufacturers out of the jurisdiction.—*Held* (reversing the decision of North J.), that the plaintiffs had shewn a primâ facie case, within Order XI., r. 1 (*f*), of a sale within the jurisdiction, and that the leave asked should be given. BADISCHE ANILIN UND SODA FABRIK *v.* HENRY JOHNSON & CO. AND BASLE CHEMICAL WORKS, BINDSCHEDLER - - - - C. A. 25

—— Injunction — Offer of undertaking by defendant - - - - 278
See INJUNCTION. 2.

—— Judgment against defendants — Further evidence on appeal — Application to Court of Appeal - - - 108
See PATENT. 1.

—— Plaintiff in representative capacity—Title of action - - - - 628
See ADMINISTRATION.

PRESCRIPTION—Opening locks on river - 214
See EASEMENT.

PRESUMPTION—Intention to keep alive security
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—— Lost grant—Opening locks on river - 214
See EASEMENT.

PRIORITY—Equitable interest—Notice - 968
See EXECUTOR. 1.

PROBATE—Grant of administration—Subsequent discovery of will - - - 270
See TRUSTEE. 10.

PROOF—By lessor — Winding up of insolvent company - - - - 978
See COMPANY. 7.

—— Secured creditor—Mode of procedure 904
See BANKRUPTCY.

RAILWAY — *Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss*, 127–129—*Superfluous Lands—Compulsory Sale — Pre-emption.*] Land acquired by the A. railway company for the purposes of their undertaking was, within the period prescribed by statute for the sale by that company of their superfluous lands, compulsorily purchased by the B. railway company:—*Held*, that such compulsory sale afforded no ground for inferring that the land was not required by the A. company for the purposes of their undertaking and was thus superfluous land within the Lands

RAILWAY—*continued.*

Clauses Act, 1845; and accordingly that the right of pre-emption under s. 128 of that Act did not arise.—*Lord Carington* v. *Wycombe Ry. Co.* (L. R. 3 Ch. 377) and *Hobbs* v. *Midland Ry. Co.* (20 Ch. D. 418) discussed. DUNHILL *v.* NORTH EASTERN RAILWAY COMPANY - - C. A. 121

2. —— *Statutory Powers—Expiration of Period for Completion of Works—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.] Sect. 16 of the Railways Clauses Consolidation Act, 1845, empowers a railway company, subject to the provisions of the special Act, to execute various works and "from time to time" to alter, repair, or discontinue the before-mentioned works and substitute others in their stead:—*Held* (by Lindley and A. L. Smith L.JJ., affirming North J., Kay L.J. deciding upon other grounds), that the powers of this last clause were not subject to a restriction in the special Act as to the time for the completion of the railway. EMSLEY *v.* NORTH EASTERN RAILWAY COMPANY - - C. A. 418

RECONSTRUCTION — Voluntary winding up of company—Allotment of shares - 947
See COMPANY. 12.

RECREATION—Right of, by inhabitants of several parishes - - - - 308
See CUSTOM.

REDEMPTION—Mortgages 644, 648, 726, 762
See MORTGAGE. 3—6.

RELEASE—Power to appoint among children 250
See POWER. 2.

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See COMPANY. 8.

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RENT-CHARGE—Tenant for life—Exoneration of land - - - - 235
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RESIDUE—Executor—Appropriation of assets
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—— Provision for annuity — Distribution of residue - - - - 351
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RES JUDICATA—Estoppel—Validity of patent upheld - - - - 667
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RESTRAINT ON ANTICIPATION — Conveyancing and Law of Property Act 1881 901
See HUSBAND AND WIFE. 2.

RETAINER—Executor - 48, 844, 925, 956
See EXECUTOR. 2—5.

REVENUE—*Estate Duty—Apportionment—Debt due on Covenant in Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6, 7, 8, 9, 14.] A father upon the marriage of his son covenanted with the trustees of the son's settlement that his executors or administrators should, within six months after his death, pay to the trustees the sum of 25,000*l.*, to be held by them upon the trusts of the settlement. The father by his will devised and bequeathed to his trustees (who were also his executors) the residue of his real and personal estate, in trust for sale and conversion, and out of

REVENUE—*continued.*
the proceeds to pay his funeral and testamentary expenses, debts and legacies, and to hold the residue upon certain trusts. After the father's death his executors paid the estate duty upon the value of his estate after deducting his funeral and testamentary expenses and his debts, other than the debt of 25,000*l.*:—*Held*, that the estate duty in respect of the 25,000*l.* must, as between the executors and the trustees of the settlement, be borne by the former. *In re* GRAY. GRAY *v.* GRAY - - - - - - - 620

2. —— *Estate Duty—Apportionment—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1—*Settlement—Power of Appointment—Residue.*] A donee of a power over settled property appointed 35,000*l.* to one and the residue otherwise:—*Held*, that the 35,000*l.* was charged on the property within the meaning of s. 14, sub-s. 1, of the Finance Act, 1894, and that estate duty was to be borne pari passu by the specific and residuary appointees. *In re* COUNTESS OF ORFORD. CARTWRIGHT *v.* DUC DEL BALZO - - - 257

3. —— *Estate Duty—Settled Estate Duty—Incidence—Apportionment between Settled Property and Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 5, 6, 8, 9, 14, 22.] When pecuniary legacies or shares of the residue of a testator's personal estate are settled by his will, no part of either the estate duty or the settlement estate duty imposed by the Finance Act, 1894, is to be borne by the settled legacies or shares, but the whole of those duties must be borne by the general residue. *In re* WEBBER. GRIBBLE *v.* WEBBER - - - - - 914

4. —— *Legacy Duty—Annuity out of Rents of Realty—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life subject thereto—Legacy Duty Act*, 1845 (8 & 9 *Vict. c.* 76, *s.* 4.] A testator who died in 1876 devised real estate to trustees for a term of 500 years, and subject thereto on limitations under which A. became tenant for life. The trusts of the term were to raise and pay out of the rents and profits of the estate an annuity to the person who should, subject to the term, be entitled to the rents and profits; and the testator declared that, subject thereto, the trustees should, during twenty-one years from the testator's death, accumulate the rents and profits and invest them in land to be settled to the same uses; and after the determination of the twenty-one years should pay the rents and profits to the person for the time being entitled to the hereditaments comprised in the term:—*Held* (Rigby L.J. dissenting), affirming the decision of Stirling J., that as A. during the period of twenty-one years had in effect a mere charge upon the estate of another person, legacy duty and not succession duty was payable on the annuity.—*Shirley* v. *Earl Ferrers* (1 Ph. 167) distinguished. *In re* DE HOGHTON. DE HOGHTON *v.* DE HOGHTON - - - C. A. 855

REVERSIONARY INTEREST — Assignment — Married woman - - - 573
See HUSBAND AND WIFE. 3.

RIPARIAN OWNER—Change of bed of river 78
See RIVER.

RIVER—*Riparian Owner — Change of Bed —*
RIVER—*continued.*
Accretions—Title by Possession.] Where a non-tidal river gradually changes its bed, and thereby adds land to or takes it away from one side, the rule that the riparian owner on that side enjoys the gain or has to bear the loss applies not only where two different persons own the opposite banks, but also where the river bed belongs to a separate owner and not to the riparian owners.—The question whether any particular land is part of the bed of a non-tidal river at any particular spot or time is one of fact, to be determined not by any hard and fast rule, but having regard to all material circumstances, including past and present fluctuations of the river, and the nature, growth, and user of the land. HINDSON *v.* ASHBY - - - - - - 78

—— Opening locks on—Prescription - 214
See EASEMENT.

RULES OF SUPREME COURT:—
—— Order III., r. 4 - - - - 628
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—— Order XI., r. 1 (f) - - - 25
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—— Order LVIII., r. 4 - - - 108
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—— —— rr. 14, 27, sub-r. 21 - - 607
See PRACTICE. 4.

RULES UNDER SOLICITORS' REMUNERATION ACT, 1881, r. 2; Sched. I., Part I. 480
See SOLICITOR. 3.
—— —— Sched. I., Part I., r. 11 - - 42
See SOLICITOR. 4.

SATISFACTION — Breach of trust — Following trust funds - - - 870
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SCALE CHARGE—Solicitor—Payment of fee to auctioneer - - - - 42
See SOLICITOR. 4.

SCHOOL BOARD—*Statutory Powers—Purchase of Land by Agreement—Person injuriously affected—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 19, 20—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.] When a school board acquire land, whether by agreement or compulsion, for the purposes of the Elementary Education Act, 1870, and purchase with notice of a restrictive covenant to which the land was subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. KIRBY *v.* SCHOOL BOARD FOR HARROGATE - - C. A. 437

SECURED CREDITOR—Proof—Mode of procedure - - - - - 904
See BANKRUPTCY.

SECURITY FOR COSTS—Misfeasance summons
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SERVANT—Legacy to persons in testator's employment for more than a specified time
See WILL. 4. 517

SERVICE—Out of jurisdiction—Act done within jurisdiction - - - - 25
See PRACTICE. 8.

SET-OFF—Costs—Solicitor's lien—Independent proceedings - - - 607
See PRACTICE. 4.

—— Mutual dealings - - - 567
See COMPANY. 10.

SETTLED LAND—"*Money liable to be laid out in the Purchase of Land*"—*Power to Trustees to Invest upon Request in Purchase of Particular Land*—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 33.] Money which the trustees of a settlement are empowered to invest, at the request of the tenant for life, in the purchase of particular land is money which is "liable to be laid out in the purchase of land" within the meaning of s. 33 of the Settled Land Act, 1882.—Where by a settlement, which comprised a moiety of certain freeholds, the trustees were empowered, at the request of the tenant for life, to invest money comprised in the settlement in the purchase of the other or unsettled moiety of the freeholds:—*Held*, that the case came within s. 33 of the Settled Land Act, 1882, and that money in the hands of the trustees might be invested, as capital money, in the purchase by them, jointly with the owner of the unsettled moiety, of land convenient to be held together with the freeholds. *In re* HILL. HILL *v.* PILCHER - - 962

2. —— *Settlement*—*Will*—*Act of Parliament*—*Next of Kin*—*Executor of Deceased Next of Kin*—*Tenants for Life*—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5; *s.* 58, *sub-s. I., cl. v.*—*Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98), *s.* 1.] The words "Act of Parliament" in the definition clause, s. 2, sub-s. 1, of the Settled Land Act, 1882, are not confined to private Acts of Parliament, but include general Acts, such as the Thellusson Act.—So where under a will a direction to accumulate was void under the Thellusson Act, and the accumulations went to the testator's next of kin:—*Held*, that the will and the Act together constituted a settlement within the meaning of the Settled Land Act, 1882.—The executrixes of a deceased next of kin and the surviving next of kin were under the joint operation of the will and the Thellusson Act entitled for the life of another to receive the rents directed to be accumulated:—*Held*, that they had jointly the powers of a tenant for life within the meaning of the Settled Land Act, 1882. VINE *v.* RALEIGH [37

3. —— *Tenant for Life*—*Rent-charge*—*Improvement*—"*Incumbrance*"—*Sale of part of Land*—*Exoneration*—*Contribution*—*Board of Agriculture*—*Sanction by*—*Tithe Act*, 1842 (5 & 6 *Vict. c.* 54), *s.* 16—*Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *ss.* 15, 63, 68, 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 5, 30—*Purchase-money*—*Interest*—*Conditions of Sale*—"*Wilful default.*"] "Incumbrance" in s. 5 of the Settled Land Act, 1882, includes a rent-charge created under the Improvement of Land Act, 1864; and therefore where settled land is subject to such a rent-charge, the tenant for life can, on a sale of part of the land, effectually exonerate the part sold by obtaining the consent of the owner of the rent-charge to charging the whole of it upon the unsold land under s. 5 of the Act of 1882, and the intervention of the Board of Agriculture under ss. 68 and 69 of the Act of 1864 is unnecessary.—Decision of Kekewich J. reversed.—As the exoneration operates as an effectual discharge of the land sold, the purchaser is not liable, under s. 63 of the Act of 1864 and s. 16 of the Tithe Act, 1842 (5 & 6 Vict. c. 54), to contribution at the instance of owners of unsold land subject to the rent-charge.—*Per* Kekewich J.: Where a purchase cannot be completed by the appointed day through the failure of the vendor to obtain the concurrence of necessary parties, he cannot claim interest from the purchaser under the usual condition requiring the purchaser to pay interest on the purchase-money "if from any cause whatever, other than the wilful default of the vendor," the purchase is not completed by the appointed day, the delay being attributable to the vendor's "wilful default." *In re* EARL OF STRAFFORD AND MAPLES C. A. 235

4. —— *Vendor and Purchaser*—*Title*—*Limitation of various Interests to same Person by way of Succession*—*Tenant for Life*—*Person entitled to Income*—"*Settlement*"—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 58, *sub-ss.* 1 (*ix.*), 2.] Real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation, and after her death to such uses as she should by will appoint, and in default to the use of herself in fee; and she contracted to sell the property to a purchaser. The Court was not satisfied that these limitations created a "settlement" within s. 2 of the Settled Land Act, 1882, but, *Held*, that the married woman had the powers of a tenant for life within s. 58, sub-s. 1 (ix.), of the same Act, and could make a title as such to the purchaser. *In re* POCOCK AND PRANKERD'S CONTRACT - - - - - - 302

—— Lunatic tenant for life—Covenants for title
See LUNACY. 3. 468

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See SETTLED LAND. 2.

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See COMPANY.

SOLICITOR—*Client alleged Lunatic*—*Order obtained ex parte*—*Pending Petition for Inquisition*—*Suppression by Solicitor*—*Costs.*] The decisions in *Hartley* v. *Gilbert* (13 Sim. 596) and *Beall* v. *Smith* (L. R. 9 Ch. 85) do not amount to a holding that a solicitor, who believes his client to be sane, cannot take proceedings in the name of the client if he knows that Lunacy proceedings are

SOLICITOR—*continued.*
pending, but only that in a proper case the Court will, when informed of such proceedings, direct a stay pending the completion of the Lunacy inquiry.—A solicitor, believing his client to be of sound mind, obtained an order for her on an ex parte application without disclosing the fact that a petition in Lunacy was pending against her. She was subsequently found to be of unsound mind. Upon an application to discharge the order:—*Held*, that the solicitor had not been guilty of such professional misconduct as to make him liable for the costs. *In re* GEORGE ARMSTRONG & SONS - - - - - - - 536

2. —— *Costs—Taxation—Solicitor and Client—Agreement—Jurisdiction to set aside—Business in Police Court and at Quarter Sessions—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.] The jurisdiction under s. 8 of the Attorneys and Solicitors Act, 1870, to set aside an agreement between a solicitor and his client as to costs relating to business done by the solicitor in a police court or at quarter sessions is in the High Court.—Neither a police court nor quarter sessions is a "Court" within the meaning of s. 8. *In re* JONES - - C. A. 222

3. —— *Costs—Taxation—Scale Fee—"Conveyance of Property"—Grant of New Easement—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Order under Act, r.* 2; *Sched. I., Part I.*] A grant of a new easement is not a "conveyance of property" within the meaning of Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881, and consequently the scale fee prescribed by Part I. of that schedule does not govern the remuneration of a solicitor in relation to such a transaction.—Sched. I., Part I., applies to cases in which an existing property or right is transferred, not to cases in which a new right or easement is created for the first time.—Decisions of Kay J. in *In re Stewart* (41 Ch. D. 494) and of Chitty J. in *In re Earnshaw-Wall* ([1894] 3 Ch. 156) approved. *In re* SANDERS' SETTLEMENT [C. A. 480

4. —— *Scale Fee for Conducting Sale—General Order under Solicitors' Remuneration Act*, 1881, *Sched. I., Part I., r.* 11.] If the purchaser, in pursuance of a condition of sale, pays a fee to the auctioneer, the solicitor is not entitled to the scale fee for conducting a sale by auction.—If the solicitor himself pays the auctioneer, the solicitor is entitled to the scale fee. CHOLDITCH *v.* JONES 42

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TENANT FOR LIFE AND REMAINDERMAN—*Payment of Charge on Inheritance—Presumption of Intention to keep alive Charge—Relation of Parent and Child.*] The presumption that a

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tenant for life who pays off a charge upon the inheritance intends to keep the charge alive for his own benefit is not rebutted by the mere fact that the relation of parent and child subsists between the tenant for life and the remainderman. *In re* HARVEY. HARVEY *v.* HOBDAY [C. A. 137

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TRADE-MARK—*Registration—Name—Fictitious Person—"Word"—Patents, Designs, and Trade Marks Acts*, 1883 *and* 1888, 46 *&* 47 *Vict. c.* 57, *s.* 64; 51 *&* 52 *Vict. c.* 50, *s.* 10.] A fictitious name, such as the name of a character in fiction, is a "word" capable of being registered alone as a trade-mark under sub-s. (*e*) of s. 10 of the Patents, Designs, and Trade Marks Act, 1888: *Per* C. A. (Lindley and A. L. Smith L.JJ., Kay L.J. dissenting), reversing decision of North J. *In re* HOLT & CO.'S TRADE-MARK [C. A. 711

TRADE UNION—*Strike—Picketing—Inducing Persons not to Contract with Plaintiffs—Intent to Injure—Malice—"Watching or Besetting"—Interlocutory Injunction—Trade Union Act*, 1871 (34 *&* 35 *Vict. c.* 31)—*Conspiracy and Protection of Property Act*, 1875 (38 *&* 39 *Vict. c.* 86), *ss.* 3, 7.] The picketing of the works or place of business of an employer, for the purpose of persuading people, whether masters or men, not to work for him, is a "watching or besetting" with a view wrongfully and illegally to compel persons to abstain from doing a lawful act, within the meaning of s. 7, sub-s. 4, of the Conspiracy and Protection of Property Act, 1875.—The defendants, officers of a trade union, ordered a strike against the plaintiff manufacturers, and also against S., a person who made goods for the plaintiffs only; and their pickets by their direction watched and beset the works of the plaintiffs and of S., for the purpose of persuading the workpeople to abstain from working for the plaintiffs.—The Court of Appeal (affirming the decision of North J.) *held*, that this kind of picketing and the strike against S. for the indirect purpose of injuring the plaintiffs were illegal acts, and they granted an interlocutory injunction to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing S. or any other persons from working for the plaintiffs by withdrawing his or their workmen from their employment.—The Conspiracy and Protection of Property Act, 1875, discussed and explained. J. LYONS & SONS *v.* WILKINS - - C. A. 811

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TRAMWAY COMPANY — *Distress — Penalty — Public Undertaking—Tramways Act*, 1870 (33 *&* 34 *Vict. c.* 78), *ss.* 28, 56.] PEGGE *v.* NEATH DISTRICT TRAMWAYS COMPANY - - - C. A. 684

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TRUST —Declaration of —Copyholds —Married woman - - - - 62
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TRUST FUND—Mortgage of—Right to receive whole fund - - - - 1
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TRUSTEE — *Breach of Trust — Following Trust Funds—Satisfaction.*] C., tenant for life under his marriage settlement of 1832, got possession of the trust funds and invested part of them in unauthorized securities, among which was 4000*l.* dock stock, in the joint names of himself and his son A. On the marriage of A., C. out of his own moneys settled on A. sums exceeding A.'s share in the funds of the settlement of 1832. In A.'s settlement was included the above sum of dock stock which A. joined in transferring to the trustees; but in the opinion of the Court it appeared from the evidence that A. did not know the origin of the dock stock, nor that it was a fund in which he had an interest; and it appeared that all the negotiations for A.'s settlement had gone on the footing that C. was settling money of his own:—*Held* (reversing the decision of North J.), that in a suit by the representatives of C.'s children to have the funds of the settlement of 1832 replaced, A. was not to be treated as having received the dock stock so as pro tanto to reduce the claim of C.'s children to have the trust funds replaced. CRICHTON *v.* CRICHTON [C. A. 870

2. —— *Breach of Trust—Investment—Power to Invest in such Securities as Trustee "shall think fit"—Commission or Bribe—Liability of Trustee to refund.*] A testator gave his residuary estate to trustees upon trust to invest "in such stocks, funds, and securities as they should think fit." The trustees invested a portion of the trust estate in 3000*l.* debentures, constituting a floating security on the undertaking and assets of a limited company. One of the trustees received a commission or bribe of 300*l.* for making this investment. The other trustee, since deceased, who was tenant for life of two-thirds of the residue, made the investment in the bonâ fide belief that it was a good one, and with the desire of increasing his income. In an action by beneficiaries seeking to make the surviving trustee and the estate of the deceased trustee jointly and severally liable to make good any loss to the trust estate occasioned by the investment:—*Held*, that the words "shall think fit" must be read as meaning "shall honestly think fit"; that in the

TRUSTEE—*continued.*

absence of evidence that the deceased trustee did not act honestly in making the investment his estate could not be made liable; but that the other trustee, having received a bribe, could not have honestly thought fit to make the investment, and was therefore liable to make good the loss:—*Held* further, that, in addition to making good the loss, the surviving trustee was liable to refund the 300*l.* as being money received by him, at the time when the investment was made, on behalf of the trust estate, and that his position was not altered by the fact that he was subsequently held liable to make good the loss occasioned by the investment. *In re* SMITH. SMITH *v.* THOMPSON **71**

3. —— *Breach of Trust—Solicitor—Agent—Solicitor becoming Constructive Trustee—Liability of Partner.*] It is not within the scope of the implied authority of a solicitor carrying on business in partnership to constitute himself a constructive trustee, and thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established. It having been held by North J. that a solicitor had constituted himself a constructive trustee, and that both he and his partner in business were liable to make good a loss which had resulted from improper investments of the trust funds:—*Held* (reversing the decision of North J.), upon the evidence, that in the matters in question the solicitor had acted only in the character of solicitor to the trustees, and that consequently neither he nor his partner were liable as constructive trustees. MARA *v.* BROWNE - - - - - **C. A. 199**

4. —— *Breach of Trust—Trustee Beneficiary—Loss to Trust Estate, Liability for—Contribution between co-Trustees—Advance of Trust Money—Repayment of Private Debt of Trustee out of Advance—Following Trust Funds.*] The rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the trust estate by a breach of trust for which both are equally to blame does not apply where one of the trustees is also a cestui que trust and has received, as between himself and his co-trustee, an exclusive benefit by the breach of trust: in that case the rule to be applied is that under which the share or interest of a cestui que trust who has assented to and profited by a breach of trust has to bear the whole loss; and the trustee who is a cestui que trust must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received.—The plaintiff and defendant, the trustees of a will, invested certain trust funds, part of the trust estate, in securities of a description authorized by the will. The plaintiff, while a trustee, became also entitled as a beneficiary to a share of the trust estate. The investments, some of which were made before and others after the plaintiff became a beneficiary, turned out insufficient, and the plaintiff and defendant were declared jointly and severally liable to make good the loss to the trust estate. The whole of the loss was made good out of the plaintiff's share of the trust estate, which share exceeded the amount of the loss:—*Held*, by the Court of Appeal, Lindley, Kay, and A. L. Smith L.JJ., affirming North J., that the plaintiff had no right of contribution from the defendant in respect of any part of the loss.—The extent of the liability of a trustee beneficiary for a breach of trust in which he is implicated, discussed.—The fact of a borrower of trust money from trustees repaying out of the money so borrowed a debt due from him to one of the trustees, is not, of itself, sufficient to render the trustee so accepting repayment liable for breach of trust, the borrower of the trust money being under no restriction as to its application. CHILLINGWORTH *v.* CHAMBERS **C. A. 685**

5. —— *Breach of Trust—Unauthorized Investment—Trustee Act*, 1893, *Amendment Act*, 1894 (57 & 58 *Vict. c.* 10), *s.* 4.] Sect. 4 of the Trustee Act, 1893, Amendment Act, 1894, has no retrospective operation so as to exempt the trustees of a will from liability for a breach of trust committed before the passing of the Act in retaining an investment of their testator's not authorized by the will or by the general law. *In re* CHAPMAN. COCKS *v.* CHAPMAN - - - **323**

6. —— *Disclaimer—Partial Disclaimer—Property in England and Abroad—Vendor and Purchaser — Title.*] A testator having real and personal property in England and abroad left his residuary estate to trustees upon trust for sale. One of the trustees disclaimed the trusts of the will except as to the property abroad. The remaining trustees sold land of the testator in England:—*Held*, that the disclaimer had no effect, and that the disclaiming trustee was a necessary party to the conveyance. *In re* LORD AND FULLERTON'S CONTRACT - **C. A. 228**

7. —— *Infant Tenant in tail in Possession—Form and effect of Vesting Order—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 31, 32, 50.] Where under the Trustee Act, 1893, an order is made vesting, or appointing a person to convey, the estate of an infant tenant in tail in possession, the effect is to bar the estate tail and remainders over.—*Powell* v. *Matthews* (1 Jur. (N.S.) 973) followed.—The order in such a case should not (as in Seton on Judgments, 5th ed. vol. ii. p. 1067, Form No. 21) contain a reference to the mode of conveyance under the Fines and Recoveries Act, but should simply vest the land for such estate as the infant, if of full age, could convey. *In re* MONTAGU. FABER *v.* MONTAGU - - **549**

8. —— *New Trustees—Person to exercise Power of appointing—Event not specified in Trust Instrument—Trustee Act*, 1893 (56 & 57 *Vict.* 53), *s.* 10.] In s. 10 of the Trustee Act, 1893, the words "person or persons nominated for the purpose of appointing new trustees by the instrument creating the trust," refer to the person or persons nominated for the purpose of appointing new trustees in the particular event which has happened. Where, therefore, by a marriage settlement the husband and wife, or the survivor of them, were empowered to appoint new trustees in certain specified events, including the event of a trustee becoming incapable, but not the event of a trustee becoming unfit, and one of the trustees became unfit but not incapable:—*Held*, that the appointment of a new trustee ought to be made not by the surviving husband as the person

TRUSTEE—*continued.*
nominated in the settlement, but by the continuing trustees under the provisions of the Act. *In re* WHEELER AND DE ROCHOW - - 315

9. —— *New Trustees of Will—Power of Appointment—Tenant for Life Donee of Power—Trustee "Abroad"—Old Trustee Executor—New Trustee Solicitor for Tenant for Life.*] Under a will containing a settlement of real and personal estate the power to appoint new trustees became exercisable in case (inter alia) either of the trustees should "be abroad." There were three trustees, and they were also the executors of the will. P., one of them, after acting with his co-trustees for ten years, in 1893 went to reside in Normandy, taking a five years' lease of a house there, and coming occasionally to England upon the trust business. In 1895 the tenant for life, who was the donee of the power, appointed T. W., her own solicitor, to be a new trustee in the place of P. Upon a summons taken out by P. and the other two original trustees, asking the opinion of the Court whether the appointment was valid:—*Held* (1.) that P. was "abroad" within the meaning of the power; (2.) that as, upon the facts, no part of the testator's estate remained vested in P. as executor virtute officii, his position was merely that of a trustee; and (3.) that although the appointment of the solicitor of the tenant for life as trustee of the settlement was not one which the Court itself would have either made or sanctioned, yet, as T. W. was in other respects a fit and proper person, as none of the beneficiaries objected, and as the tenant for life did not appear to have acted capriciously, the Court could not treat the appointment as invalid, though it would give P. liberty to apply, so that his right of indemnity as legal personal representative should not be prejudiced in case it should turn out that any liability on his part still existed. *In re Kemp's Settled Estates* (24 Ch. D. 485) and *In re Marquis of Ailesbury* ([1893] 2 Ch. 345) observed upon. *In re* EARL OF STAMFORD. PAYNE *v.* STAMFORD - - - - - 288

10. —— *Trustee Relief Act — Payment into Court by Administrator of supposed Intestate—Subsequent Discovery of Will—Revocation of Administration—Order for Payment out to Executor.*] The administrator of a supposed intestate paid into court, under the Trustee Relief Act, several sums of money, part of her estate, to the credit respectively of several infants who were some of her next of kin. A will having been afterwards discovered, the grant of administration was revoked, and probate of the will was granted. Upon a petition by the executor and the ex-administrator, to which the infants were made respondents:—*Held*, that there was jurisdiction to order the funds in court to be paid out to the executor, and an order was made accordingly.—But the Court required an affidavit that some legacies bequeathed by the will to the infants had been paid. *In re* HOOD'S TRUSTS - - - - 270

—— Accountants—Audit—Stock-taking—Costs, charges and expenses - - 778
See PARTNERSHIP. 3.

—— Charity lands—Sale—Consent of Charity Commissioners - - - 596
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ULTRA VIRES—Payment of dividends where no profits—Liability - - - - 331
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UNDERTAKING — Offer of, by a defendant — Costs - - - - - 278
See INJUNCTION. 2.

VENDOR AND PURCHASER—*Leaseholds—Sale by Auction—Onerous Covenants—Duty of Vendor to disclose — Constructive notice to Purchaser.*] The rule laid down by the Court of Appeal in *Reeve* v. *Berridge* (20 Q. B. D. 523), that it is primâ facie the duty of a vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to demand inspection of the vendor's title-deed before entering into a contract, is not confined to sales by private contract, but is equally applicable to sales by auction. Where, therefore, on a sale of leaseholds by auction the particulars and conditions of sale contained no statement as to the nature of the covenants in the lease (which were in fact onerous), nor any notice that the lease might be inspected at the office of the vendor's solicitors or elsewhere:—*Held*, that the purchaser was not affected with constructive notice of the covenants; that he had not had a fair opportunity of inspecting the lease, and was, therefore, not bound to complete the contract. *In re* WHITE AND SMITH'S CONTRACT [637

—— Title—Partial disclaimer of trusts - 228
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—— Title—"Settlement" - - - 302
See SETTLED LAND. 4.

VESTING ORDER—Form and effect of—Infant tenant in tail in possession - 549
See TRUSTEE. 7.

VOLUNTARY ASSOCIATION — *Member—Retirement—Acceptance.*] The members of a voluntary trade protection society became such by election, and paid an annual subscription, in return for which they were entitled to legal assistance for the purposes of their trade and to some other benefits. By the rules the members incurred no obligation beyond the payment of their subscriptions. The rules contained no provision as to the retirement or expulsion of members:—*Held*, that a member was entitled to retire at any time without any consent of the other members; that on the receipt by the society of a letter from a member stating his wish to retire he at once ceased to be a member, without the necessity of the acceptance by the society of his resignation; that he could not before acceptance withdraw his resignation; and that he could not become a member again without re-election.—Decision of Kekewich J. reversed. FINCH *v.* OAKE C. A. 409

WARDS OF COURT—Custody—Religious education—Misconduct of father - 740
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WAY-LEAVE — Trespass by tipping spoil — Measure of damages - - 894
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WILL—*Advancement—Interest—Option for Sons successively to take Testator's Business—Son taking*

WILL—*continued.*

to be debited with Value—Accumulation of Income—Division of Residue and Accumulations—Equality — Advancement of part of Residuary Share.] A testator by his will gave each of his sons in succession, according to seniority, the option of succeeding to his business, and declared that the son electing to do so should be debited with the value thereof in the division of his residuary estate, and if the value should exceed the amount of such son's expectant share therein at the time the option was declared, he should refund the excess to the testator's residuary estate. Then, after giving certain legacies to his other children, sons at twenty-five, and daughters at twenty-one or marriage, which were to carry interest from his death applicable for maintenance, the testator gave his residuary estate upon trusts for sale, conversion, and investment and payment of certain annuities, and directed the trustees to accumulate the surplus income at compound interest for twenty-one years from his death, if any child of his should so long live and be under twenty-one, and on the attainment of twenty-one by his youngest living child (which was to be the period of distribution) to hold the trust fund in trust for his children then living as tenants in common. The will also empowered the trustees, at any time before the period of distribution, to make advances out of the capital of the trust premises in favour of any of his sons, the sums so advanced to be taken in part satisfaction of the shares in the trust premises to which the sons advanced should become entitled.—The testator died in 1883, leaving three sons and two daughters. The eldest son in 1884 elected to succeed to the business, the value of which (15,000*l.*) did not at the time exceed the amount of his expectant share. The youngest child attained twenty-one in 1894; and meanwhile the second son had, under the powers of advancement, received sums amounting to 8200*l.* :—*Held*, by the Court, that in debiting the eldest son with the value of the business taken by him, he ought not to be debited with interest thereon from the time he took it, but only from the period of distribution :—*Held*, also, by Lord Herschell and A. L. Smith L.J. (Rigby L.J. dissentiente), that as to the sums advanced to the second son no interest ought to be charged thereon prior to the period of distribution.—The principles applicable with reference to advancement commented on and explained.—The decision of Kekewich J. affirmed. *In re* Dallmeyer. Dallmeyer *v.* Dallmeyer [C. A. 372

2. —— *Alienation, Provision against—Trust—Life Interest—Attachment of Income by Judgment Creditor of Tenant for Life—Garnishee Order.*] A testator gave his real and personal estate to trustees upon trust to pay to his son so much of the income accruing due during his lifetime "as would not, although the same was payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the said income as would, if the same were payable to my said son, be disposed of as last aforesaid" for the benefit of his son's wife and children at the discretion of the trustees. On April 16, 1895, the trustees had in their hands a sum representing income due and payable to the son. On April 17 they were served by creditors of the son with a garnishee order attaching the money in their hands, and in pursuance thereof they paid over the money to the creditors. On an application by the son's wife to recover it from the trustees :—*Held*, that the trusts of the income during the son's life were valid in law; that the time at which the destination of any instalment of income was to be determined was the moment at which that instalment either became due or was in the hands of the trustees ready for application under the trusts of the will; that the son's title to the money accrued on April 16, 1895, and that the plaintiff consequently never became entitled to the benefit of the discretionary trust in her favour. *In re* Sampson. Sampson *v.* Sampson - - - - - - 630

3. —— *Legacy—"Legal Disability"—Fictitious bankruptcy of Legatee—Mortgage and Assignment by him—Defaulting Trustee—Charge on Beneficial Interest—Construction of Will.*] A testator after giving the income of his residuary estate to his wife for life, subject thereto gave a moiety of such estate to his son; but in case the son should at the death of the testator's wife be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," the testator gave over the same to his said son's wife and children.—Just before the death of the testator's widow, and while she was in extremis, the son, being heavily indebted, applied for and obtained a receiving order and an order for adjudication in bankruptcy against himself; but within three weeks afterwards both these orders were annulled on the ground that they never should have been made: —*Held*, that the "legal disability" contemplated by the testator was not one arising simply from the voluntary act of his son, but one imposed by the law of the land; and that, although, primâ facie, bankruptcy would be a disability imposed by law, yet inasmuch as the bankruptcy of the son had been a mere contrivance on his part to procure a benefit for his wife and children, he was not under any real disability arising therefrom.—Before the death of the testator's wife the son had mortgaged and assigned all his interest under the will; and, in an action to administer the testator's estate, a sum of money found due from him as executor, in respect of assets he had received, was also charged upon his aforesaid interest :—*Held*, that the disability which had thus arisen was due to his own voluntary acts, so that the gift over did not take effect. *In re* Carew. Carew *v.* Carew - 527

4. —— *Legacy to persons who should have been in Testator's Employment for more than a Specified Time—Construction of Will.*] A testator directed his trustees "to pay to each man who shall have been in my employ over ten years the sum of 10*l.* for each year's service beyond the said ten years" :—*Held*, that a man who had been in the testator's employment for fifteen years, but had left his employment before the date of the will, and was not in his employment at the time of

WILL—*continued.*

his death, was entitled to a legacy of 50*l.* *In re* SHARLAND. KEMP *v.* ROZEY - - - 517

5. —— *Legacy to Plant Trees—Construction of Will.*] A bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life:—*Held*, primarily for the benefit of the owners for the time being, and to belong to persons entitled to the estate absolutely. *In re* BOWES. EARL STRATHMORE *v.* VANE 507

6. —— *Power to Postpone Sale—Trust for Sale—Power to carry on Business.*] A power to postpone the sale of all or any part of a residue devised and bequeathed on trust to sell, and particularly to sell his business of a pawnbroker with all convenient speed, *held* not to give power to carry on the business for an indefinite time.—The Court, under the circumstances, authorized the trustees to carry on one of the testator's two businesses (of a pawnbroker) for two years.—*In re Crowther* ([1895] 2 Ch. 56) considered. *In re* SMITH. ARNOLD *v.* SMITH - - - 171

7. —— *Power to postpone Sale and Conversion of Estate—Property "not actually producing Income"—Tenant for Life and Remainderman—Construction of Will.*] The will of a testator contained the ordinary clause empowering his trustees to postpone the sale and conversion of his estate, and declaring that the income thereof, previous to the conversion, should be applied as if it were income arising under investments authorized by the will. Then followed this proviso: "but no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income."—There was a debt, due to the testator at the time of his death, which could not be got in; and the trustees took from the debtor as security for it a third mortgage upon certain policies of insurance on his life. The debtor died in the lifetime of a lady who was tenant for life under the will, and the trustees, who had received neither principal nor interest in respect of the debt, realized their security, with the result that, after payment of the prior charges, they received a sum which was less than the amount due by all the interest and some of the capital:—*Held* (reversing the decision of Stirling J.), (1.) that according to the rule of the Court this sum represented the arrears of interest as well as the capital, and (2.) that it must be treated as property actually producing income within the meaning of the proviso, and must be apportioned between the tenant for life and the remainderman in the proportion that the interest due from the date of the mortgage bore to the capital thereby secured. *In re* HUBBUCK. HART *v.* STONE - - - C. A. 754

8. —— *Settlement—Married Woman—Fee Simple—Separate Use—Restraint on Anticipation—Tenant by the Curtesy—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1; *s.* 58, *sub-s.* 1 (*viii.*); *s.* 61, *sub-s.* 6—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 8—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.] Under a will certain real estate was vested in trustees in trust for A. for life, and on her death in trust for her children equally as tenants in common: the shares of daughters to be for their separate use without power of anticipation. On a sale of the real estate upon A.'s death, two of the vendors who were married women claimed to convey as tenants for life within the meaning of the Settled Land Act, 1882. The purchaser contended that they must convey as absolute owners and obtain an order under s. 39 of the Conveyancing Act, 1881:—*Held*, in an action for specific performance, that the husbands, if they survived, taking an estate by the curtesy by virtue of the general law and not under the will, and the estate given to the married women being one and entire with no limitation to the husbands, the effect of the restraint on anticipation was not to bring the case within s. 2 of the Settled Land Act, 1882, as creating a settlement whereby the estate was limited to persons by way of succession; and, therefore, that the married women were not tenants for life within the meaning of the Act. BATES *v.* KESTERTON - - - 159

—— Annuity—Administration - - 351
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